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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

BUDGET RENT-A-CAR OF WASHINGTON-OREGON, INC.
Petitioner
v.
THE HERTZ CORPORATION AND NATIONAL CAR RENTAL SYSTEM, INC.
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

QUESTION NO. 1

Is there a commercial activities exception to the *Noerr-Pennington* doctrine?

QUESTION NO. 2

Are business concerns privileged, under the *Noerr-Penninton* doctrine, to engage in anticompetitive conduct in commercial dealings with municipal agencies where such agencies would themselves be subject to antitrust liability under *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389 (1978)?

PARTIES TO THE PROCEEDING BELOW

All parties to the proceedings below which are subject to this Petition for Writ of Certiorari are set forth in the caption of this Petition.

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DESIGNATION OF CORPORATE RELATIONSHIPS

This is the Designation of Corporate Relationships by petitioner Budget Rent-A-Car of Washington-Oregon, Inc.

Budget Rent-A-Car of Washington-Oregon, Inc. is not owned by any parent corporation, does not have any subsidiaries, and does not have any corporate affiliates.

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Petitioner, Budget Rent-A-Car of Washington-Oregon, Inc., respectfully prays that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on November 16, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit was rendered on November 16, 1982 and is reported in *In re Airport Car Rental Antitrust Litigation: Budget Rent-A-Car of Washington-Oregon, Inc. v. Hertz Corp.*, 693 F.2d 84 (9th Cir. 1982) (Appendix "A"). The opinion of the District Court which was appealed to the Court of Appeals is reported in *In re Airport Car Rental Antitrust Litigation*, 521 F.Supp. 568 (N.D.Cal. 1981) (Appendix "B").[1]

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 16, 1982 (Appendix "D"). A Petition for Rehearing was timely filed and was denied on January 26, 1983 (Appendix "E"). The jurisdiction of this Court is pursuant to 28 U.S.C. §1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutes and constitutional provisions are quoted in Appendix F:

Sherman Antitrust Act, §§ 1, 2, 26 Stat. 209, as amended, 15 U.S.C. §§ 1,2 (1976).

Clayton Antitrust Act, §§ 14 and 16, 38 Stat. 730, as amended, 15 U.S.C. §§ 15 and 26 (1976).

First Amendment U.S. Const., Amend. I.

[1] This case presents the highly unusual situation of two separate reported opinions written by two district judges that directly conflict with each other. The district court opinion cited above (referred to as *"Airport II"* throughout) overruled *In Re Airport Car Rental Antitrust Litigation*, 474 F.Supp. 1072 (N.D. Cal. 1979)[hereinafter *"Airport I"*](Appendix "C"). This situation arose when the district judge who initially presided over the case and decided *Airport I* retired from the bench and the case was transferred to a different district judge.

STATEMENT OF THE CASE

This antitrust action challenges an alleged conspiracy among The Hertz Corporation ("Hertz"), National Car Rental Systems, Inc. ("National") and Avis Rent-A-Car Systems, Inc. ("Avis") (collectively "The Big Three") to eliminate competition and monopolize the on-airport car rental market at public airports in Washington and Oregon. For years the Petitioner, Budget Rent-A-Car of Washington-Oregon, Inc. ("Budget"), attempted to gain access to compete in this lucrative market but was foreclosed because of The Big Three's conspiratorial conduct.

All the parties to the action are actively engaged in the business of renting of automobiles to the traveling public. A significant portion of the industry consists of renting automobiles to deplaning passengers at public airport facilities. Because of their convenient locations and ready access to customers, car rental companies actually located on airport premises enjoy a competitive advantage over companies located off the airport.

Presence on airport facilities is controlled by the municipal agencies ("Airport Authorities") (RCW 14.07.010 and 015; RCW 53.04.010; ORS 778.010 and 015; quoted in Appendix F) which manage the airports from a business standpoint. No state mandate governs them in their commercial dealings. Rather, these Airport Authorities make their decisions based upon the same economic principles utilized by private business men in traditional commercial transactions.[2]

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[2] The directors of each of the airports involved have admitted that decisions concerning car rental concessions were matters of business judgment. Mr. Donald Shay, Director of Aviation for the Port of Seattle, the municipal corporation which owns and operates the Seattle-Tacoma International Airport, provided the following information in this regard:

> Q. In performance of your duties as director of aviation for the Seattle Airport, do you consider one of your duties the maximization of revenues from airport concessions?
>
> A. Yes, I do.

(Shay Deposition, p. 62, lines 15-18; appellate record at 440).

To a similar question Mr. I. James Church, Deputy Executive Director for the Port of Portland, the agency which owns and operates Portland International Airport, responded as follows:

> Q. Has the Port of Portland Commission, that's the policy setting arm of the Port, have they always directed the staff to operate in such a manner as to maximize the revenues of the airport?
>
> A. Yes.

(Church Deposition, p. 80, lines 7-11. Appellate Record at 446).

During the 1960's and early 1970's Budget made numerous requests and formal applications to the Airport Authorities at the Seattle-Tacoma International Airport, Portland International Airport and Spokane International Airport seeking on-airport car rental concessions. These requests and applications were systematically rejected at all three airports. The rejections were premised upon Budget's inability to meet certain restrictive criteria which The Big Three successfully included in their concession leases or induced the Airport Authorities to adopt as policy. These restrictions effectively eliminated new entrants in the on-airport car rental market. Examples of this criteria were: a specific minimum number of years of experience in the on-airport car rental market; limitations on the number of car rental companies which could operate on the airport premises; proof of an established national advertising program; existence of a national credit card system; payment of a guaranteed fee at least equal to the lowest base fee which any of The Big Three had contracted to pay; existence of an established reservation system which operated throughout the United States; and a "rent it here, leave it there" capacity.

Despite the repeated denials to be allowed to compete in the on-airport car rental market, Budget pursued its desire to gain on-airport status. Finally, in the early 1970's (1969 at Spokane) the Airport Authorities permitted Budget access to the on-airport car rental market at their respective airports. However, even then, as a result of the Respondents' anticompetitive activities, Budget was denied equivalent or comparative facilities at the airports.

In 1977, Budget filed its action against The Big Three attacking

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Mr. Floyd R. Creasman, the Airport Director of Spokane International Airport which is jointly owned and operated by the City of Spokane and Spokane County, answered the operant factor question in the following fashion:

> Q. With respect to the various airport concessions that are operated, do you attempt to maximize the revenues you receive from those concessions?
>
> A. Yes, sir.
>
> Q. Is that a policy of the airport, to maximize revenues from concessions located on-airport?
>
> A. Yes, it is.

(Creasman Deposition, p. 31-32, lines 25-6. Appellate Record at 452).

their conspiracy. Budget alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 with jurisdiction under Sections 14 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26. The Airport Authorities which refused Budget entry to the on-airport market in deference to The Big Three were named as non-party conspirators. Specifically, Budget alleged that Hertz, Avis and National jointly combined with the Airport Authorities and each other to adopt bidding specifications and contractual provisions designed to exclude all other car rental companies from participation at the airport; that they combined with the Airport Authorities in bad faith to oppose all on-airport applications by the other car rental companies; and that they jointly agreed to fix car rental rates at the airports.

Shortly after filing, Budget's action was consolidated with a number of other actions alleging the same anticompetitive conduct by The Big Three at various other airports throughout the country. The consolidated multidistrict litigation was initially presided over by the Honorable Charles B. Renfrew, United States District Judge for the Northern District of California. Budget's case from the point of the consolidation forward, has been conducted within the context of that multidistrict litigation.

In 1978, The Big Three moved for summary judgment against other parties in the multidistrict litigation with respect to three "test" airports (Austin, Denver and Miami) on grounds that the *Noerr-Pennington* doctrine[3] immunized their conduct. Judge Renfrew, in a lengthy analytical opinion, denied the motion. In his forty-five page opinion, he reasoned that the *Noerr-Pennington* doctrine did not exist in isolation of the state action doctrine embodied in *Parker v. Brown*.[4] Focusing on the commercial aspects of the airport leasing arrangements and the municipal level of governmental involvement, he concluded that such local governmental decisions of a purely commercial nature did not give rise to immunity under the *Noerr-Pennington*

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[3] The so-called *Noerr-Pennington* doctrine emanates from *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) which are discussed in detail throughout the Petition.

[4] The *Parker v. Brown* doctrine, as it has come to be called, originates from this Court's decision in *Parker v. Brown*, 317 U.S. 341 (1943) which is discussed in detail throughout this Petition.

doctrine. Particularly significant to Judge Renfrew was the inequitable anomaly which would exist if *Noerr* immunity were to extend to the private participants of an anticompetitive scheme when the municipal participants enjoyed no such immunity under the *Parker v. Brown* doctrine. Based on this reasoning and prior precedent from the other circuits, Judge Renfrew affirmatively recognized a commercial activities exception to the *Noerr-Pennington* doctrine.

Within a brief time after rendering this decision, Judge Renfrew retired from the bench and the entire multidistrict litigation was reassigned to the Honorable William W. Schwarzer.[5] Undaunted by their failure to convince Judge Renfrew, Hertz and National took a second bite at the apple. (Avis had been dismissed from the suit by that time.) In 1979, they filed another motion for summary judgment, again asserting their conduct was immunized under the *Noerr-Pennington* doctrine. In surprising fashion, Judge Schwarzer granted this motion ruling that there was no commercial activities exception to the *Noerr-Pennington* doctrine and that the *Noerr-Pennington* and *Parker v. Brown* doctrines need not be applied consistently.

Budget appealed Judge Schwarzer's decision to the United States Court of Appeals for the Ninth Circuit. In a three and one-half page opinion which, for unexplained reasons, did not even mention Judge Renfrew's decision, the Ninth Circuit affirmed Judge Schwarzer's grant of summary judgment. In doing so, the Ninth Circuit assertively held:

> "There is no commercial exception to the *Noerr-Pennington* doctrine."

Petitioner's Petition to the Ninth Circuit for Rehearing was denied by order of the Court dated January 26, 1983.

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[5] To avoid confusion the two district judges are referred to by name throughout.

ARGUMENT

I. The Noerr-Pennington Doctrine Must Be Reconciled With the State Action Immunity Doctrine of Parker v. Brown.

Although this Court has vigorously and repeatedly asserted the comprehensive coverage of the Sherman Act,[6] 15 U.S.C. §1 et seq.,

> [t]wo policies have been held sufficiently weighty to override the presumption against implied exclusions from coverage of the antitrust laws.

City of Lafayette v. Louisiana Power and Light Co., 435 U.S. 389, 399 (1978). These policies, described as "correlative principles," *id.* at 399, have come to be known as the *Parker v. Brown* doctrine and the *Noerr-Pennington* doctrine. Both doctrines consider exemptions to the Sherman Act in the interstices of the relationship between private actors and governmental entities; however, each doctrine is primarily concerned with only one side of that relationship. The *Noerr-Pennington* doctrine protects members of the private sector interfacing with the government from antitrust liability under certain circumstances while the *Parker v. Brown* doctrine immunizes state level governmental action from the Sherman Act.

It has been over a decade since this Court has considered the *Noerr-Pennington* doctrine. Yet, with respect to the *Parker* doctrine, the Court has been a much more frequent caller. In what might aptly be described as a flurry of opinions,[7] this Court

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[6] *See, e.g., United States v. Topco Associates*, 405 U.S. 596, 610 (1972); *Manderville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948); *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, 553-56 (1944).

[7] From the time *Parker v. Brown* was decided in 1943 until 1975, this Court did not address the state action immunity question. Since 1975, the Court has addressed the issue of immunity under the *Parker* doctrine in seven cases. *Community Communications Co. v. City of Boulder*, 455 U.S. 401 (1981); *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

has significantly narrowed the scope and restricted the application of *Parker v. Brown*. These recent decisions, culminating with the *City of Lafayette, supra*, and *Community Communications Co. v. City of Boulder*, 455 U.S. 401 (1981) have greatly increased the exposure of municipal entities to liability under the antitrust laws. A clear message has been sent: local governments must obey the antitrust laws. While the Court has mapped out guideposts for municipal entities treading into competitive territories, it has not yet considered the effect this will have on the commercial concerns with whom these local governments deal.

It is now established that in most instances municipal governments are no longer immune from the antitrust laws merely becaue of their "official" status. *City of Boulder, supra, City of Lafayette, supra.* Inversely, though, under the Ninth Circuit's holding in this case, private actors participating with municipal "officials" in anticompetitive schemes, irrespective of the benefits they receive or their degree of involvement, may still assert *Noerr-Pennington* as a defense.

The commercial marketplace is the setting where the anomaly created by the disparate application of these doctrines is most pronounced. Here, where no overriding policy is at issue, the relationship between the private actors and the subordinate governmental entities is premised exclusively on mutually advantageous economic factors. To punish those on the governmental side while allowing the private parties to escape serves the underlying purposes of neither doctrine. Where the government is making purely economic decisions as a business entity, the *Noerr-Pennington* doctrine should not provide a shield for the anticompetitive behavior of those with whom it deals.[8]

The increasingly large role that local governmental entities are playing in the national economy has been well recognized by this Court. *City of Lafayette, supra*, 435 U.S. at 407-08. In contracting for services, purchasing goods or leasing property, these governmental bodies have become active commercial participants as distinguished from policy makers. The wholesale exemption of all concerted attempts to influence municipal governments when they are acting in the capacity of a market

[8] In *Georgia v. Evans*, 316 U.S. 159 (1942), a case decided before *Noerr*, this Court held that the Sherman Act was applicable to a conspiracy to fix prices and suppress competition while selling to a state government.

participant threatens to create an enormous gap in the antitrust laws. There is nothing in *Noerr* or its progeny which can or should be read as giving carte blanche to unscrupulous businessmen in their commercial dealings with municipal governments.

Besides sanctifying an inequitable imbalance which immunizes private anticompetitive conduct in instances where municipal governments face antitrust liability, the Ninth Circuit's holding also conflicts with decisions in the First,[9] Second,[10] Fifth,[11] and District of Columbia Circuits.[12] All of these Circuits have recognized the inapplicability of the *Noerr-Pennington* doctrine to anticompetitive efforts by business concerns aimed at influencing commercial, non-policy oriented governmental determinations.

II. The Noerr-Pennington Doctrine Applies Only to Political Activity Which Seeks the Passage or Enforcement of Laws.

The *Noerr-Pennington* doctrine is based on a trilogy of cases decided by this Court between 1961 and 1972:[13] *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., supra; United Mine Workers v. Pennington, supra;* and *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

Noerr marked the Court's first attempt to analyze the dynamic workings of the antitrust laws as they related to attempts by

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[9] *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir.) *cert. denied* 440 U.S. 850 (1970), *remanded*, 376 F.Supp. 125 (D. Mass., *aff'd*, 508 F.2d 547 (1st Cir.), *cert. denied*, 421 U.S. 104 (1974). For an excellent discussion of the *Whitten* case see Case Comment, WHITTEN v. PADDOCK: *The Sherman Act and the "Government Action" Immunity Reconsidered*, 71 Colum.L.Rev. 140 (1971).

[10] *Litton Systems, Inc. v. American Telephone and Telegraph Co.*, 700 F.2d 785,807 (2d Cir. 1983).

[11] *Woods Exploration and Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

[12] *Hecht v. Pro-Football, Inc.* 444 F.2d 931 (D.C.Cir. 1971), *cert denied*, 404 U.S. 1047 (1972).

[13] The *Noerr-Pennington* doctrine was raised as an issue in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973). There, however, the Court did not consider the application of the doctrine but, instead, remanded the case for consideration in light of the intervening decision in *California Motor Transport, supra.*

private interests to influence government policy.[14] There this Court held that "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." 365 U.S. at 136. In reaching this decision, the Court expressed concern over the application of the Sherman Act to political activities, distinguishing such conduct from normal business activities. Such an application, the *Noerr* Court reasoned, would be an erroneous construction of the Act because of the "essential dissimilarity" between agreements which seek the enactment or enforcement of laws and agreements "traditionally condemned" as anticompetitive. *Id.* at 136.

The decision also considered the need for a free flow of information as an important element of an informed government and the first amendment right to petition. However, because the Court unanimously decided the case on construction of the Sherman Act, it was necessary to consider whether the railroads activities were protected by the first amendment. *Id.* at 132 n.6.

Thus, *Noerr*, decided on statutory construction of the Sherman Act, established an antitrust exemption for private interests engaged in political activities. In so construing the Sherman Act, the Court drew a clear distinction between political and business activities. "The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena." *Id.* at 141. From a policy standpoint, this political/business dichotomy is sound. The economic factors which command the competitive marketplace are poor judges of social values, therefore there is no need to insure their integrity in

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[14] In *Noerr* a group of trucking companies and their trade association brought a treble damage action under Sections 1 & 2 of the Sherman Act against a group of railroads and a public relations firm they had engaged. Feeling lost revenues from the encroaching competition of the trucking industry in the long-distance freight market, the railroads instituted a multi-faceted campaign designed to vilify the truckers. The railroads retained a public relations firm to formulate and manage the negatively oriented publicity campaign. While remaining hidden from the public through this "third party" technique, the railroads achieved high success. In fact, they were able to convince the governor of Pennsylvania to veto legislation favorable to the trucking industry. The truckers prevailed at trial, 155 F.Supp. 768 (E.D. Pa. 1957), and the judgment was affirmed by the Third Circuit, 273 F.2d 218 (3d Cir. 1959).

a political setting.

Clearly, an immunity for private anticompetitive conduct designed to influence the government where it is acting as a buyer or seller in the marketplace can find no support in *Noerr*. The statutory construction underpinnings of *Noerr* are not shaken when commercial endeavors, as opposed to political activities, are brought within the anticompetitive regulations of the Sherman Act. Such marketplace transactions are not "essentially dissimilar" or outside the realm of agreements "traditionally condemned" by the Act. *See Georgia v. Evans, supra.*

United Mine Workers v. Pennington, supra,[15] decided four years after *Noerr*, reaffirmed its vitality. The *Pennington* case, although not decided on first amendment grounds, established that:

> Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.

Id. at 670.

Before this decision could be reached, however, the *Pennington* Court had to distinguish the prior precedent of *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). In *Continental Ore*, it was held that a conspiracy to eliminate a competing vanadium ore producer from selling to the Canadian Government constituted a "private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws." *Id.* at 707.[16] As such this Court concluded that the defendants' activities were not protected because they did

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[15] *Pennington* involved a combined effort by several large coal companies and union officials to persuade the Secretary of Labor to act under the Walsh-Healey Act, 41 U.S.C. § 35 et seq., and the Tennessee Valley Authority, through a restricted procurement policy, to establish a higher minimum wage in the industry. It was alleged that raising the cost of labor in this manner would work to the detriment of the smaller coal companies that brought the action.

[16] *See also Litton Systems, Inc. v. American Telephone and Telegraph Co., supra.* In *Litton* the Second Circuit recently rejected AT&T argument that the *Noerr-Pennington* doctrine would preclude antitrust liability based upon tariff applications to regulatory agencies. Citing *Continental Ore* the *Litton* Court held that "the *Noerr-Pennington* doctrine is 'plainly inapposite' because AT&T was 'engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws.' " 700 F.2d at 807.

not "remotely infringe upon any of the constitutionally protected freedoms spoken of in *Noerr.*" *Id* at 708. Interestingly, the *Continental Ore* opinion attached no significance to the fact that a foreign government was involved. The private commercial nature of the challenged conduct and the fact that there was no indication that the Canadian government would have approved the monopolization effort formed the basis of this Court's decision.

In *Continental Ore*, decided after *Noerr* but before *Pennington*, the Court had an opportunity to extend *Noerr* to governmental commercial activities. It declined to do so. The decision not to bring commercial activities within the scope of the judicially created immunity to the antitrust laws, was not altered by *Pennington*. Its holding, exempting concerted efforts to influence the Secretary of Labor to raise the minimum wage, is clearly consistent with the teachings of *Noerr* and its application in *Continental Ore*.

The third case in the trilogy is *California Motor Transport Co. v. Trucking Unlimited, supra.*[17] There the Court extended the *Noerr* exemption to combined attempts to influence courts and administrative bodies. While extending the doctrine to adjudicatory proceedings though, the Court simultaneously carved out an exception to the immunity. Fearing the abuses which would ensue if individuals could "acquire immunity by seeking refuge under the umbrella of 'political expression' " the "sham" exception to *Noerr-Pennington* was established. *Id.* at 513.

The Court in *California Motor Transport*, contrary to its approach in *Noerr*, did not attempt to construe the Sherman Act as justification for its holding. Rather, the decision was grounded firmly on the first amendment. Notwithstanding these constitutional underpinnings, the Court declined to create an all encompassing exemption to *Noerr*. By so establishing an exception to the *Noerr-Pennington* doctrine the Court realized that merely because the right to petition might be implicated by the nature of

[17] *California Motor Transport* was an action brought under the Sherman Act between competing trucking interests. The plaintiff had alleged that the defendants, in concert, had sought to monopolize trade in their market area by instituting meritless, dilatory and harrassing administrative proceedings in opposition to the plaintiff's efforts to acquire motor carrier operating rights throughout California.

a commercial entity's activity, "that does not necessarily give them immunity from the antitrust laws." *Id.* at 514. This reasoning becomes more compelling the further the activity deviates from conduct involved with the right to petition.

California Motor Transport stands for the proposition that the first amendment right to petition, in the context of antitrust immunity, extends to all branches of government. This important right, however, may not be used as a means or pretext for achieving "substantive evils". *Id* at 515. To the extent that antitrust laws may infringe on the legitimate exercise of this right, such activities are exempt. To the extent that activities do not implicate the right to petition, then sanctity diminishes. Under these circumstances the justification for immunizing such conduct necessarily yields to other considerations. The promotion of competition is one such consideration. Furthermore, *California Motor Transport* teaches that not all attempts to influence the government are exempt from the Sherman Act. As the Court indicated, misrepresentations, bribery and perjury, at least in administrative proceedings, may incur antitrust liability even though such behavior may well be designed to influence the government. *Id.* at 512-13.

Activities which fall within areas traditionally associated with the right to petition the government for redress justifiably deserve immunity from treble damage exposure. This exception, however, should be guarded and applied consistent with the dignity of the important right which it seeks to protect. In enacting the antitrust laws, the government has made a legitimate decision to promote competition and restrict restraints on trade. It is important to remember that the enactment of these laws regulating business practices was, in and of itself, a consequence of the very same right to petition.

Within this framework it is difficult to see why commercial activities should enjoy a blanket exemption simply because a subordinate unit of government is a participant. Such a proposition implies that any ordinary business transaction with the government, down to the procurement of pencils, would be worthy of constitutional protection. Because *California Motor Transport* posits the *Noerr* immunity on the first amendment, a more sensible approach would be to employ principles developed in protected speech cases to guide application of the *Noerr-*

Pennington doctrine.[18]

III. The Parker v. Brown Doctrine is Applicable Only to Governmental Action Emanating at the State Level.

Parker v. Brown, 317 U.S. 341 (1943), was decided over four decades ago. The question presented was whether the federal antitrust laws prohibited a state, in exercising its sovereign powers, from imposing certain anticompetitive restraints. This issue arose when a disgruntled farmer challenged a marketing program adopted by the State of California which limited the ability of raisin farmers to freely market their crops. The resolution of this issue hinged on the fact that the marketing program derived its authority from the legislative command of the state. Since the Court could find nothing in the language or history of the Sherman Act "which suggest[ed] that its purpose was to restrain a state or its officers or agents from activities directed by its legislature," *id.* at 350-51, the program was held exempt from the antitrust laws. This implied exception to the Sherman Act was grounded in respect for the governmental structure of federalism and state sovereignty. *See, e.g., California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., supra,* 445 U.S. at 103-04.

The extent to which the *Parker* doctrine was applicable to subordinate governmental bodies was defined and restricted in the *City of Lafayette v. Louisiana Power and Light Co., supra.* In a plurality decision which upset the long held view of many local governments who assumed they were immune from the antitrust laws,[19] the Court rejected the contention that *Parker v. Brown* "extended to all governmental entities, whether state agencies or subdivisions of a state . . . simply by reason of their status as such." 435 U.S. at 412. Emphasizing the federalism and state

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[18] One commentator argues persuasively for value of such an approach. Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Bases and Limits of the Noerr-Pennington Doctrine*, 45 U.Chi.L.Rev. 80 (177). Under this theory free speech issues raised by cases involving commercial transactions with government entities would be treated in the same fashion as first amendment issues arising in private conspiracies.

[19] *See* Taurman, *Reflections on City of Lafayette Applying the Antitrust "State Action" Exemption to Local Government*, 13 Urb. L.J. 159, 180 (1981).

sovereignty origins of the *Parker* doctrine, this Court reasoned that it would be "inconsistent" absent a clearly articulated and affirmatively expressed state policy to include municipalities within its exemptive scope. *Id.* at 410-412. In the decision, municipal participation in the marketplace, for antitrust purposes, was justifiably compared with that of private companies in the Court's telling analogy which equated community constituency with corporate shareholders. *Id.* at 403.

An ambiguity which may have existed because of the plurality decision in the *City of Lafayette* was resolved by this Court's decision in *Community Communications Co. v. City of Boulder, supra.* There a majority of the Court unequivocally stated that municipalities must obey the antitrust laws. The fact that the City of Boulder was a "home rule" municipality guaranteed local autonomy under the Colorado Constitution was not a sufficient state mandate to invoke the *Parker* immunity. Implicit in this decision is recognition of the fact that municipalities often promulgate regulations favoring one individual enterprise over another. In such instances, *City of Boulder* tells us, it is wholly appropriate to apply blanket exemptions to the antitrust laws. *Accord Jefferson County Pharmaceutical Association, Inc. v. Abbott Laboratories*, 103 S.Ct. 1011 (1983).

IV. The Noerr-Pennington Doctrine Must be Applied Consistently with the Parker v. Brown Doctrine as It Has Been Defined in the City of Lafayette.

The principles underlying the *Noerr-Pennington* and *Parker v. Brown* — the right to petition and comity in a federal system —are as fundamental as they are different. However, the two principles did not develop in a vacuum and cannot be viewed as isolated, mutually exclusive concepts. Neither doctrine, despite their divergent origins, purports to tamper with the applicability of the Sherman Act to business activities.

In *Noerr*, this Court based its decision, in part, on the authority of *Parker v. Brown*. The *Noerr* Court cited *Parker v. Brown* for the proposition that the Sherman Act was designed to regulate business and not political activities. 365 U.S. at 137. Later, in the *City of Lafayette*, the Court affirmatively recognized that the *Parker* doctrine stood side by side with *Noerr-Pennington*. In

comparing the two, Justice Brennan stated that both doctrines have been "unavailing to prevent antitrust enforcement" where an activity merely implicates the fundamental policies underlying the doctrines but does not severely infringe upon them. *Id.* at 400.

If the Court's analysis in *City of Lafayette* bears any relationship to the *Noerr-Pennington* doctrine, it follows that there must be some limitation on the immunity which extends to private parties interacting with subordinate governmental entities. This would be especially true in situations where the *Parker* doctrine would not exempt the government's participation. Two factors which were significant in *City of Lafayette* would necessarily be relevant to this determination: (1) the extent to which a subordinate governmental entity is acting in its own parochial interests rather than implementing a policy of the state; and (2) the extent to which the governmental entity is engaged in a commercial activity similar to those performed by private entities in the marketplace.[20]

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[20] The existence of this second factor in the case led the Chief Justice to side with the plurality. Under the analysis proposed in his concurring opinion, the proprietary nature of the municipal activity becomes the pivotal issue. 435 U.S. at 418-27 (Burger, C.J., concurring). According to the Chief Justice, a proprietary function is:

1. "a business activity . . . in which a profit is realized," 435 U.S. at 418 (quoting the district court opinion);
2. activity by a "proprietary enterprise with the inherent capacity for economically disruptive anticompetitive effects," Id. at 418;
3. activity by an entity with a "competitive posture and resulting incentive to engage in anticompetitive practices," Id. at 418 n.1;
4. activity by an "entrepreneur in the economic community," Id. at 419;
5. activity not undertaken pursuant to a "sovereign" decision "to replace competition with regulation." Id. at 422;
6. activity by a party "possess[ing] the means to thwart federal antitrust policy," Id. at 422 n.3;
7. a function not "essential to separate and independent existence" of state and local government, Id. at 423;
8. activity by a "business enterprise," Id. at 424;
9. an activity which is not "an integral operation in the area of traditional government functions," Id. at 424;
10. an undertaking which has not "traditionally been the prorogative of the State," Id. at 424.

The situation presented here falls within each of the references to a "proprietary" function in the Chief Justice's concurring opinion.

The Ninth Circuit considered neither of these factors. If it had, it could not have arrived at the stated result. The governmental entities involved in this case are agencies subordinate to municipal governments and staffed with non-elected officials. They are entrusted simply with the operation and maintenance of the airports.[21] No articulated state policy is served by their decision concerning which rental car company shall be permitted to operate on the airport where most car rental business is conducted. Instead, their decision making process is governed by principles of business judgment no different from the factors which private interests consider in making economic choices among competing suppliers.[22] The maximization of airport revenues is a purely commercial concept comparable to the driving force behind all business endeavors. By ignoring the status and function of the airport authorities, the Ninth Circuit suggests that the teachings of *City of Lafayette* are irrelevant to the antitrust immunity afforded to private actors who deal commercially with local governments.

In stark contrast to Justice Brennan's observations about the relationship between the two doctrines, the Ninth Circuit has concluded that they exist in total independence of each other. In a three and one-half page opinion, without any discussion of how a conspiracy between airport managers and Hertz, Avis and National "impinges" upon the right to petition or the flow of open communication between the polity and the lawmakers, the Ninth Circuit summarily concluded that antitrust immunity was warranted. This decision creates an automatic antitrust exemption to private actors engaged in commercial dealings with subordinate government entities.[23] It ignores the existence of any

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[21] The operation of an airport, in the parlance of the Chief Justice, is a "proprietary" function. *See Lockheed Air Terminal, Inc. v. City of Burbank*, 411 U.S. 624, 635 n.14 (1973). For post-*Lafayette* decisions which also recognize the proprietary nature of airports *see Guthrie v. Genesse Country*, 494 F.Supp. 950 (W.D.N.Y. 1980); *Pinehurst Airlines, Inc. v. Resort Air Service, Inc.*, 476 F.Supp. 543 (M.D.N.C. 1979); *Woolen v. Surtran Taxicabs, Inc.*, 461 F.Supp. 1025 (N.D. Tex. 1978).

[22] See excerpts from the deposition testimony of the airport directors regarding this matter at note 2 *supra*.

[23] By analogy, under the Ninth Circuit's reasoning, a conspiracy affecting a municipal sanitation department's decision about which local filling station to use to purchase gasoline for its garbage trucks, would give rise to the invocation

correlation between the *Parker* and *Noerr-Pennington* doctrines and flies in the face of the disciplined approach employed by this Court in *City of Lafayette*.

V. Contrary to the Ninth Circuit's Ruling, A Commercial Activities Exception to the Noerr-Pennington Doctrine Does Exist.

The procedural context in which this case arises presents a highly uncommon situation. There are two separate reported opinions written by two district judges faced with essentially the same issue which are in direct conflict. In *Airport I*, Judge Renfrew ruled that the *Noerr-Pennington* doctrine does not extend to private parties who seek to assert their influence in purely commercial settings. When presented with the same issue in the same multidistrict case two years later, Judge Schwarzer, in *Airport II*, ruled that there was no commercial activities exception to the *Noerr-Pennington* doctrine. The Ninth Circuit, in a three and one-half page opinion, affirmed *Airport II* without distinguishing, criticizing, citing or even referencing Judge Renfrew's opinion in *Airport I*. In no uncertain terms the Ninth Circuit held: "There is no commercial exception to *Noerr-Pennington*." 693 F.2d at 88.

The Ninth Circuit in this case recognized three cases as seemingly supporting the existence of a commercial activities exception to *Noerr-Pennington*: *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., supra; Woods Exploration & Producing Co. v. Aluminum Co. of America, supra;* and *Hecht v. Pro-Football, Inc., supra.* Although none of these cases use the actual term "commercial activities" exception, all three rejected contentions of *Noerr* immunity in the context of a "business" setting involving a government entity.

In addition to representing a sound and sensible approach consistent with the broad policies of the antitrust laws, these decisions are controlling authority in their respective circuits.[24]

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of the *Noerr-Pennington* doctrine and its attendant first amendment rationale. Similarly, a price fixing conspiracy between private parking garages and a municipal parking authority would subject the municipal authority to antitrust liability while the conspiring garage operators would escape under *Noerr*.

[24] The Ninth Circuit in the instant case suggests that *Whitten* may no longer be

The Ninth Circuit's casual treatment of these decisions belies their importance.

George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., supra, is cited as the seminal decision establishing a commercial activities exception to the *Noerr-Pennington* doctrine.[25] There the First Circuit refused to sanction the defendant's anticompetitive business practices, holding "that the immunity for efforts to influence public officials in the enforcement of laws does not extend to efforts to sell products to public officials acting under competitive bidding statutes." 424 F.2d at 33. Realizing that a municipality's decision concerning the type of weld to use on a swimming pool gutter was quite different from policy determinations at the highest level weighing the advantages accruing from expanded commercial utilization of the state's highway, the court logically found *Noerr* distinguishable. Focusing on the language of *Noerr* which differentiated political and business activities, the *Whitten* court carved out an exception with respect to the latter. 424 F.2d at 33-34. Where the conspirator's activities fell within this sphere, no antitrust immunity attached.

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good law. "It is possible that *California Motor Transport* implicitly overruled *Hecht, Woods* and *Whitten.*" 693 F.2d at 87. The First Circuit, where *Whitten* was decided, does not share this view. Recently, in *Corey v. Look*, 641 F.2d 32 (1st Cir. 1981) the First Circuit cited *Whitten* for the proposition that *Noerr* may be inapplicable where the challenged conduct does not involve political activities or implicate the right to petition. Id. at 36 n.6 Similarly, *Hecht* has recently been relied upon by the District of Columbia Circuit. In *Federal Prescription Service v. American Pharmaceutical Ass'n.*, 663 F.2d 253, 263 n.10 (D.C. Cir. 1981) the court cited *Hecht* for the proposition that "[p]rivate efforts to influence governmental bodies acting in an economic rather than a political framework, e.g., a governmental procurement agency, have been held unprotected by *Noerr* because these efforts, in *Noerr's* terms, constitute 'business activity' rather than 'political activity.' " For a post *California Motor Transportation* case in the Fifth circuit affirming the vitality of *Woods*, see *Whitworth v. Perkins*, 559 F.2d 378, 381 (5th Cir. 1977), *vacated and remanded sub nom. City of Impact v. Whitworth*, 435 U.S. 992 (1978), *opinion reinstated and case remanded per curiam sub nom. Whitworth v. Perkins*, 576 F.2d 696 (5th Cir. 1978), *cert. denied*, 440 U.S. 991 (1979).

[25] *Whitten*, presented on stipulated facts in the context of a motion for summary judgment, involved a monopolization claim between swimming pool contractors that competed in the municipal pool market. For the purposes of the motion the defendant conceded that it used high pressure salesmanship, deceit and threats to accomplish its practice of persuading local authorities to adopt bid specifications which only their equipment could meet.

Refusing to extend antitrust immunity to such commercial activities takes into account the important role local governments play in the marketplace and the correlative need to restrict overly broad antitrust immunity to this significant segment of the economy.[26] Furthermore, it demonstrates the *Whitten* court's appreciation for the fact that anticompetitive practices at the municipal level generally further only private interests with no corresponding benefit in return.[27] *See also Westborough Mall v. City of Cape Girardeau*, 693 F.2d 733 (8th Cir. 1982).

In *Hecht v. Pro-Football, Inc., supra,*[28] the Court of Appeals for the District of Columbia adopted the reasoning that the *Noerr-Pennington* doctrine did not authorize anticompetitive conduct by persons leasing government property in a purely commercial setting.[29] The stadium lease involved was viewed by the court as no different than a contract between private parties and, as such, subject to the antitrust laws.

Despite the factual similarity between *Hecht* and the instant case, the Ninth Circuit treated the decision with brief dispatch. Analytically though, the two cases are indistinguishable. Both involved commercial leases which impacted adversely on competition. In each, quasi-public bodies charged only with responsible

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[26] In the *City of Lafayette, supra*, this Court recognized that there were over 60,000 units of local government which "affect the economic life of this nation in a great number and variety of ways." 435 U.S. at 408.

[27] It has been said that *Whitten* contained "the forerunner of the *Lafayette* test." Hart, *State Action Immunity for Airport Operators*, 12 Trans L.J. 1, 33 n.172 (1981).

[28] *Hecht* involved a challenge under the Sherman Act by a group of aspiring football promoters who were aggrieved because the District of Columbia Armory Board and the Washington Redskins entered into a 30-year lease which contained a covenant prohibiting any other professional football team from also leasing R.F.K. Stadium. Because there were no other suitable facilities, the lease gave the Redskins a monopoly on all professional football in the area. The defendant's argument that mere governmental participation in the lease conferred them with antitrust immunity was labeled a facile conclusion and promptly rejected. The proprietary nature of this commercial transaction led to the decision. The fact that the government was the supplier of the facility was not deemed controlling.

[29] *Hecht* was cited favorably by the Court in the *City of Lafayette, supra*, for the proposition that local governments acting in the commercial sphere have a significant impact on individuals and business enterprises with whom they interrelate. 435 U.S. 403 n.24.

property management entered into restrictive agreements with private interests. In both situations the leases contained anti-competitive clauses in favor of private commercial interests which enjoyed economic leverage over aspiring competitors. Additionally, and most significantly, there was no overriding public policy taking precedence over the economic factors relevant to the governmental decision-making in *Hecht* as there is none here. In short, there is no way the two cases can be reconciled. The Ninth Circuit's decision is in direct conflict with *Hecht*.

Woods Exploration & Producing Co. v. Aluminum Co. of America, supra,[30] is the third case which the Ninth Circuit rejected as authority for a commercial exception to the *Noerr-Pennington* doctrine. *Woods* involved a situation where the government was functioning as a regulator of commercial activity rather than acting as a participant. Because of the regulatory overtones, however, its authority as a basis for a commercial activities exception to the *Noerr-Pennington* doctrine is even more compelling. The regulatory agency involved was acting in a purely ministerial capacity attempting to effect an equitable allocation among private competitors. The operative decision though was made by the private business interests which supplied the data. The defendant, more than attempting to influence the decision of the administrative agency, was, in fact, making the decision. This type of behavior is not outside the scope of the antitrust laws.[31]

For the purpose of analyzing behavior designed to influence

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[30] In *Woods* a state agency had statutory authority to impose limitations on the natural gas production in an area where the plaintiff and defendant had competing wells. To calculate the production for each individual well, the agency applied predetermined formulas. Because the defendant controlled 90% of the subject field's surface area it could, through the filing of false data, cause the agency to issue lower production quotas for the plaintiff's wells. Since the agency accepted the data at face value and simply applied it to patterned formulas, the Fifth Circuit reasoned that the defendant's activities did not become "merged with the action of the state." 438 F.2d 1295. For the purpose of *Noerr* immunity, the defendant's attempt to undermine the efficacy of the agency's function for anticompetitive reasons precluded its application.

[31] *See Cantor v. Detroit Edison Co., supra,* 428 U.S. at 593-95; *Litton Systems Inc. v. American Telephone & Telegraph, supra, 700 F.2d at 807-08; City of Kirkwood v. Union Electric Co.*, 671 F.2d 1173, 1181 (8th Cir. 1982).

governmental actions there is no difference between situations where the ultimate decision is ministerial or commercial in origin. Both are governed by objective predetermined standards. While commercial decisions may look to principles of financial management, ministerial decisions turn on prescribed non-policy oriented criteria.

Read together *Whitten, Hecht* and *Woods* unequivocally support the proposition that a commercial/governmental distinction to the *Noerr-Pennington* doctrine does exist. Merely because the "government" or some "government official" was involved, the antitrust laws did not fall by the wayside. The doctrine protects political efforts to influence the passage and enforcement of laws and the formation of policy. Without such political considerations the *Noerr-Pennington* doctrine was simply inapplicable. The facile assertion that a decision or action was "official" did not extend the *Noerr-Pennington* doctrine to commercial and ministerial settings.

The three cases cover the spectrum of non-policy making government participation in the marketplace: *Whitten* - purchaser; *Hecht* - supplier; and *Woods* - regulator. In each instance private interests were deriving substantial economic benefits under claims of immunity despite the fact that no policy decision was at issue. As correctly discerned by the First, Fifth and District of Columbia Circuits, conspiracies to exclude competitors from the marketplace through the exertion of influence on government agents acting in a commercial or ministerial role do not fall within the proper scope of the *Noerr* immunity. Such concerted actions can hardly be characterized as political activity having an "essential dissimilarity" with traditional Sherman Act violations. See *Noerr, supra*, 365 U.S. at 1136-37; *Kurek v. Pleasure Driveway & Park Dist.*, 557 F.2d 580,593 (7th Cir. 1977). To the contrary, these are precisely the type of "business" settings which should be subject to the Sherman Act.[32]

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[32] *See Corey v. Look*, 641 F.2d 32 (1st Cir. 1981) (parking concession at municipal dock); *City of Mishawaka v. American Electric Power Co.*, 616 F.2d 976 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981) (public utility in competition with municipal utility); *Kurek v. Pleasure Driveway & Park Dist.*, 557 F.2d 580 (7th Cir. 1977), *vacated and remanded*, 435 U.S. 992, *reinstated in part*, 583 F.2d 378 (7th Cir. 1978) (pro shop concession at municipal golf course); *Duke & Company, Inc. v. Forester*, 521 F.2d 1277 (3d Cir. 1975)

VI. This Court Should Reject the Ninth Circuit's Contention That No Commercial Activities Exception Exists and Adopt the Logic of Airport I.

Judge Renfrew, in a forty-five page opinion, after a comprehensive analysis, was compelled to conclude that *Noerr-Pennington* does not exist in total isolation from the state action immunity embodied in the *Parker* doctrine.[33] While his opinion does not purport to suggest that absolute symmetry between the two immunities is mandated, it does call for a sensible dual application that does not undermine the rationale of either. The one situation where such an application clearly made sense to Judge Renfrew was when the government engaged in commercial transactions in the marketplace. What appeared to trouble Judge Renfrew most was the inequitable anomaly which would exist in the absence of a dual and balanced application of the doctrines. He saw no value in a distinction which would leave municipalities exposed to liability under the antitrust laws while at the same time hold sacred the anticompetitive conduct of private parties who derived substantial benefits from their economic relationship with such subordinate governmental units. Where immunity had been denied to a municipality, it seemed logical to question the validity of applying an absolute exemption to the private beneficiaries of the local government's commercial decision.[34]

(beverage concession at municipal airport); *Sacramento Coca-Cola Bottling Co. v. Chauffeurs Teamsters and Helpers Local No. 150*, 440 F.2d 1096 (9th Cir.) *cert. denied*, 404 U.S. 826 (1971) (soft drink concession at state fair); *City of Atlanta v. Ashland-Warren, Inc.*, 1981-1 Trade Cas. (CCH) ¶ 64,527 (N.D.Ga. 1981) (municipal roadbuilding contracts); *General Aircraft Corp. v. Air America, Inc.*, 482 F.Supp. 3 (D.D.C. 1979) (manufacture and sale of aircraft to foreign government).

[33] Judge Renfrew had previously considered some of the issues raised here in his ruling denying the motion to dismiss. *Dollar Rent A Car Systems, Inc. v. Hertz Corp.*, 434 F.Supp. 513 (N.D.Cal. 1977).

[34] *See Kurek v. Pleasure Driveway & Park Dist., supra*, where the Seventh Circuit suggested that if the local government activity is not protected by *Parker*, then neither may the related private activity be protected by *Noerr-Pennington*.

> Our determination that the Park District and its officials had no state mandate on authority to engage in the activities attacked here necessarily reduces the applicability of the reasoning of *Noerr* to the degree it is based on the need for governmental units for citizen input in making decisions

Judge Schwarzer, intent on disposing of the entire multidistrict action with one stroke of the pen,[35] reversed Judge Renfrew's decision, and discredited the notion that there was any relationship between *Noerr-Pennington* and *Parker v. Brown*. He found no guidance in this Court's decision in *City of Lafayette* which suggested that such a relationship did exist. Rather, he conveniently concluded that the overriding first amendment concerns controlled this commercial lease situation.

The weakness in Judge Schwarzer's reasoning illustrates the strength in Judge Renfrew's decision. In *City of Lafayette*, this Court discussed the relationship between the *Noerr-Pennington* and *Parker* doctrines. Judge Renfrew, taking direction from the analysis in that decision, examined the interworkings of the two doctrines. In so doing he concluded that the airport authorities involved would not be exempt from antitrust liability under *Parker*. This conclusion led him to look beyond the assertions of blanket immunity and consider the nature of the activity: on-airport car rental concessions. Viewing this as entrepreneurial in nature and without support of any sovereign decision to replace competition with regulation, he reasoned that the justification for antitrust immunity in this instance appropriately diminished. He then went forward to examine what first amendment values were actually involved in leasing airport space to car rental companies and found none. It was only after this thorough analysis that he was able to determine that Hertz, Avis and National, under these circumstances, did not deserve *Noerr* immunity.[36]

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that *Parker* holds to be outside the scope of the Sherman Act. 557 F.2d at 593.

[35] In his opinion Judge Schwarzer stated that "[t]he decision on this motion may be largely dispositive, not only of the Budget action but of the other pending actions as well." 521 F.Supp. at 573.

[36] Two commentators have considered the rationale of extending antitrust immunity to car rental companies which lease on-site space at municipal airports. Hart, *State Action Immunity for Airport Operators, supra* note 27 at 46-47; Comment, *The Airport Car Rental Concessions: The Role of the City of Lafayette v. Louisiana Power and Light Co. in Restricting Threats to Free Competition*, 14 Cal. W.L. Rev. 325, 347-49 (1978). Both have reached the same conclusion that there's little reason not to apply the competitive mandate of the Sherman Act to this purely business situation.

VII. The "Commercial Activities" Exception Does Not Infringe Upon the First Amendment Considerations of the Noerr-Pennington Doctrine.

The first amendment underpinnings of the *Noerr-Pennington* doctrine are not offended by a commercial activities exception. To the contrary, this exception represents a desirable limitation on the scope of a doctrine which was spun from political origins. If a government entity seeks only to obtain the most favorable economic terms unencumbered by superceding policy considerations, the application of the antitrust laws no more infringes on protected speech than does the prohibition of anticompetitive speech in private commercial undertakings. *See Carey v. Look, supra,* 641 F.2d at 36. In such cases, free speech issues should be reviewed under the same standards applicable to first amendment defenses raised in private antitrust actions. *See Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers,* 542 F.2d 1076, 1087-91 (9th Cir. 1976) (J. Browning dissenting). Treatment in this manner correctly keeps concepts of protected commercial speech separate and distinct from the *Noerr-Pennington* doctrine.[37]

This Court has stated that the constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Central Hudson Gas. v. Public Service Commission,* 447 U.S. 557, 562-63 (1980). The wholesale application of the *Noerr-Pennington* doctrine to commercial conspiracies because of governmental presence as a potential customer elevates these otherwise illegal combinations to a status far exceeding that afforded any other type of commercial speech. The justification for this privileged position just does not exist in any of the Court's pronouncements on protected commercial speech. *See, e.g., Central Hudson Gas v. Public Service Commission of New York, supra; Friedman v. Rogers,* 440 U.S. 1 (1979); *Ohralik v. Ohio State Bar Association,* 436 U.S. 447 (1978); *Pittsburg Press Co. v. Human Relations Commission,* 413 U.S. 376 (1973). Moreover, the Sherman Act is as important to the

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[37] *See* Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine,* supra note 18 at 115-118.

preservation of economic freedom and free enterprise as the Bill of Rights is to the protection of fundamental personal freedoms. *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972); *Litton Systems Inc. v. American Telephone & Telegraph Co., supra,* 700 F.2d at 813.

VIII. The Status and Applicability of the Noerr-Pennington Doctrine is in a State of Turmoil.

A. THE LOWER COURTS HAVE HAD DIFFICULTY FASHIONING *NOERR-PENNINGTON* GUIDELINES.

Confusion exists in the lower courts over the nature and scope of the *Noerr-Pennington* doctrine. Because it immunizes conduct to which antitrust liability would otherwise attach, it is generally raised as in issue whenever a government entity can somehow be implicated. As such, courts have had to deal with its application in a variety of situations spaning the entire range of government levels[38] and degrees of involvement.[39] Out of the divergent contexts in which Noerr-Pennington issues have arisen, few clear rules or guidelines have emerged. With the exception of the so-called "sham" exception articulated in *California Motor Transport, supra,*[40] the lower courts have had little guidance as to what other types of anticompetitive behavior implicating some governmental entity are also unprotected by *Noerr*. The conflicting opinions which have emerged in this area demonstrate the need for direction from this Court.

Some courts have held that participation by a government

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[38] *Compare Hecht v. Pro-Football, Inc., supra,* (municipal sports authority) *with Landmarks Holdings Corp. v. Bermant,* 664 F.2d 891 (2d Cir. 1981) (State Supreme Court).

[39] *Compare Subscription Television, Inc. v. Southern California Theatre Owners Ass'n.*, 576 F.2d 230 (9th Cir. 1978) (political campaign in support of referendum on state-wide ballot) *with Forro Precision, Inc. v. International Business Machines,* 673 F.2d 1045 (9th Cir. 1982) (informing municipal police department of suspected trade secret theft).

[40] This exception to the *Noerr-Pennington* doctrine has also provided some difficulty to the lower courts. There is a split of authority on whether a single claim is sufficient to support an application of the sham exception. *See Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 674 F.2d 1252, 1266 n.24 (9th Cir. 1982) (collecting cases).

official in a conspiracy may preclude an antitrust exemption to the private conspirators. *See Duke v. Foerster, supra,* 521 F.2d at 1281-83; *Harmon v. Valley Nat'l Bank,* 339 F.2d 564 (9th Cir. 1964) *Mason City Center Ass'n v. City of Mason City,* 468 F. Supp. 737 (N.D. Iowa 1979). This exception to the *Noerr-Pennington* doctrine which has come to be known as the "co-conspirator exception" has been criticized as unworkable and has fallen into disfavor. *See Westborough Mall v. City of Cape Girardeau, supra,* 693 F.2d at 745-46; *Metro Cable Co. v. CATV of Rockford, Inc.,* 516 F.2d 220, 229-30 (7th Cir. 1975); *Sun Valley Disposal Co. v. Silver State Disposal Co.,* 520 F.2d 341, 342-43 (9th Cir. 1969). Although the emerging view seems to be that the effect of the *Noerr-Pennington* doctrine would be completely abrogated if the persuaded public official could simply be labeled a co-conspirator, this exception still has some vitality. *See* City of Atlantic v. Ashland-Warren, Inc., supra, ¶64, 527 at 72,929.

A recent decision in the Eighth Circuit has further muddled the state of any consistent analysis which might be applied to conduct falling outside the scope of the *Noerr-Pennington* doctrine. In *Westborough Mall v. City of Cape Girardeau, supra,* an aspiring shopping mall developer sued a competing developer and several municipal officials alleging that they had entered into a conspiracy which improperly revoked his zoning approval and granted the defendant developer's zoning petition shortly thereafter. Without finding the circumstances to fall within any of the previously recognized exceptions to the *Noerr-Pennington* doctrine, the court nevertheless found that *Noerr* would not apply.[41]

It was obvious to the *Westborough* court that the defendant was trading on an advantageous familiarity that he enjoyed with the municipal officials. Not wishing to sanction such a situation, the court searched for justification to refuse to extend immunity to the developer. In so doing, the court appreciated full well the

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[41] While the court spoke of illegality and fraud, it is hard to see how this could form the basis of the decision. The only illegality referred to was the reversion of the plaintiff's zoning approval - an act which could only have been effected by the municipal defendants. What constituted the fraudulent act was never discussed. The fact that the zoning reversion was the handiwork of municipal officials who were outside the scope of *Noerr* did not enter into the Court's analysis with respect to the private developer.

fact that the municipal actors would not be similarly immunized citing the *Community Communications Co. v. City of Boulder, supra.*

Westborough Mall evidences part of the dilemma facing the lower courts. While they may be reluctant to extend the *Noerr-Pennington* doctrine, they have been unable to fashion a logically consistent standard which draws a line between permissible and impermissible anticompetitive manipulation of governmental entities. Especially troublesome is where the court is faced with issues of *Noerr-Pennington* immunity while knowing that the municipal actors will be unable to qualify for immunity under the *Parker* doctrine. The *Westborough* decision, similar to that presented by the instant case, illustrates the informal relationship that is common between municipal officials and local businessmen and the fact that "official" action is often a product of this relationship.

B. CONFLICTING DECISIONS OVER THE COMMERCIAL EXCEPTION TO THE *NOERR-PENNINGTON* DOCTRINE DEMAND RESOLUTION.

With respect to the commercial activities exception the lack of any consensus is pronounced. The Ninth Circuit's opinion in this case holding that no commercial activities exception to the *Noerr-Pennington* doctrine exists impliedly overrules *Sacramento Coca-Cola Bottling Co. v. Chauffers, Teamsters and Helpers Local No. 150, supra,* and is in conflict with a number of decisions in other circuits. See *Litton Systems, Inc. v. American Telephone & Telegraph Co., supra; George P. Whitten Jr., Inc. v. Paddock Pool Builders, Inc., supra; Hecht v. Pro-Football, Inc. supra; Woods Exploration and Production Company v. Aluminum Co. of America, supra; General Aircraft Corp. v. Air America,* 482 F. Supp. 3 (D.D.C. 1979); *City of Atlantic v. Ashland-Warren, Inc., supra; See also, Kurek v. Pleasure Driveway & Park Dist., supra,* 557 F.2d at 592-99; Israel v. *Baxter Laboratories, Inc.,* 446 F.2d 272, 276 (D. C. Cir. 1972). The Ninth Circuit's view, however, does finds support in several district court decisions, *See Australia/ Eastern U.S.A. Shipping Conference v. United States,* 1982-1 Trade Cas. (CCH) ¶ 64,721 at

74,070-71 (D.D.C. 1981); *Bustop Shelters, Inc. v. Convenience & Safety Corp.*, 521 F.Supp. 989 (S.D.N.Y. 1981); *Reaemco, Inc. v. Allegheny Airlines*, 496 F. Supp. 546, 556 (S. D. N. Y. 1980).

The *Litton* decision in the Second Circuit, because of its recent vintage, most clearly highlights the conflict which exists over the application of the *Noerr-Pennington* doctrine to private commercial activity. In *Litton*, the Court held that AT&T did not qualify for *Noerr-Pennington* immunity because its anticompetitive tariff filings amount to nothing more than a "private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws." 700 F.2d at 807.[42] It is difficult, if not impossible, to reconcile this view with the Ninth Circuit's suggestion in this case that the commercial aspects of conspiratorial conduct, for purposes of *Noerr-Pennington*, are irrelevant.

The need for guidance in this important area is manifest.

CONCLUSION

The context in which this case is presented to the Court offers an ideal opportunity to clarify an important antitrust doctrine which has not been addressed in over a decade. Recently, a number of decisions decided under the *Parker v. Brown* doctrine has significantly limited the scope of municipal antitrust immunity. Conversely, the Court has not considered the status of the immunity enjoyed by the private parties' interacting with municipalities in light of these decisions. The "commercial activities" exception to the *Noerr-Pennington* doctrine, analyzed by Judge Renfrew, offers a logical analysis of the interworkings of these two "correlative" immunities. The Ninth Circuit has rejected the wisdom of his reasoning and continues to view the *Noerr-Pennington* doctrine in total isolation of the *Parker v. Brown* doctrine. To continue to permit private parties to engage in anticompetitive conduct in a commercial setting, now that it is clear that local governments with whom they deal are not

[42] Judge Kearse did not concur in this portion of the opinion. She did, however, join in the conclusion that AT&T tactics amounted to an "abuse of the administrative process that falls within the Noerr-Pennington sham exception." 700 F.2d at 812.

immune from antitrust liability, creates an untenable anomaly. The "commercial activities" exception eliminates this unsatisfactory imbalance and provides a framework within which *Noerr-Pennington* doctrine can be reconciled with *Parker v. Brown* doctrine.

Respectfully submitted this 25th day of April, 1983.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

BUDGET RENT-A-CAR OF WASHINGTON-OREGON, INC.
Petitioner
v.
THE HERTZ CORPORATION AND NATIONAL CAR RENTAL SYSTEM, INC.
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR CERTIORARI

APPENDICES

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: Airport Car Rental Antitrust Litigation	)	
BUDGET RENT-A-CAR OF WASHINGTON-OREGON, INC.,	)	**No. 81-4399** **No. 78-0697**
Plaintiff-Appellant,	)	**OPINION**
v.	)	
THE HERTZ CORP. and NATIONAL CAR RENTAL SYSTEM, INC.,	)	
Defendants-Appellees.	)	

Appeal from the United States District Court
for the Northern District of California
William W. Schwarzer, District Judge, Presiding
Argued and Submitted July 16, 1982
Decided November 16, 1982

Before: CHOY, SNEED and FARRIS, Circuit Judges.

CHOY, Circuit Judge:

This appeal requires us to decide whether the so-called *Noerr-Pennington* exemption from the antitrust laws protects concerted efforts to lobby public officials who operate state-owned airports. We, as did the district court, conclude that it does.

I. *Facts*

A number of relatively small car-rental companies sued The Hertz Corp., Avis Rent A Car Sytems, Inc., and National Car Rental Systems, Inc., on the ground that these industry giants had engaged in a nationwide conspiracy to monopolize the lucrative on-airport car-rental market. The lawsuits were consolidated into a single multidistrict litigation. This appeal concerns only the entry of summary judgment against one plaintiff who alleges misconduct at three airports located in the Pacific Northwest. *See In re Airport Car Rental Antitrust Litigation,*

521 F.Supp. 568 (N.D. Cal.1981).

Budget Rent-A-Car of Washington-Oregon, Inc., claims that Hertz and National lobbied officials at the Seattle-Tacoma, Portland and Spokane International Airports to lease space only to car-rental companies that satisfied a number of very restrictive requirements. The major one compelled the company to pay the airports a rental fee equal to that paid by Hertz, Avis and National. Other requirements included a nationwide credit-card and reservations system, additional car-return stations away from the airport, and a specified number of years experience at a specified number of airports. Hertz and National thus hoped to exclude newcomers from the airports.[1]

II. *Discussion*

A. *The Noerr-Pennington Doctrine*

Through a series of decisions,[2] the Supreme Court has exempted from the antitrust laws certain concerted efforts to influence government officials regardless of anticompetitive purpose. The twin pillars upholding the *Noerr-Pennington* doctrine are:

(1) the vital role played by free-flowing communication in a representative democracy, and

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[1] Budget also alleged that Hertz and National engaged in other conduct that *Noerr-Pennington* might not protect: bribing airport officials, *see Rangen, Inc. v. Sterling Nelson & Sons*, 351 F.2d 851, 861-62 (9th Cir.1965), *cert. denied*, 383 U.S. 936, 86 S.Ct. 1067, 15 L.Ed.2d 853 (1966), making bad-faith misrepresentations to the officials, *see Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 674, F.2d 1252, 1269—73 (9th Cir.1982), bringing baseless lawsuits against Budget, *see Clipper Exxpress*, 674 F.2d at 1266—67; *Ernest W. Hahn, Inc. v. Codding*, 615 F.2d 830, 840—41 (9th Cir. 1980), and submitting illegally fixed prices for car rental to the officials for their summary approval, *see Cantor v. Detroit Edison Co.*, 428 U.S. 579, 601—02, 96 S.Ct. 3110, 3122—23, 49 L.Ed.2d 1141 (1976) (plurality opinion). Because Budget presented no evidence to support these allegations, the district court properly disposed of them on a motion for summary judgment.

[2] Rather than discuss the formative decisions, as has been done so often, we simply note that they are *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965), *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972), and *Cantor*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141.

(2) the first amendment right to petition the government for the redress of grievances.

City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 399, 98 S.Ct. 1123, 1129, 55 L.Ed.2d 364 (1978); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609, 611, 30 L.Ed.2d 642 (1972). In order to determine whether *Noerr-Pennington* protects a particular activity, we must evaluate whether exempting it would further these two interests sufficiently to justify overriding the antitrust laws. *See, e.g., Ernest W. Hahn, Inc. v. Codding*, 615 F.2d 830, 842—43 (9th Cir. 1977).[3]

In the case before us, Budget asserts that three considerations weaken the interests upholding *Noerr-Pennington*. First, the attempts by Hertz and National to influence airport officials constitute commercial speech, to which the first amendment accords only limited protection. *See Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 562—63, 100 S.Ct. 2343, 2349—50, 65 L.Ed.2d 341 (1980). Second, they petitioned non-elected officials of an agency subordinate to the state legislature or governor. Perhaps free-flowing communication so vital to decisionmaking in a representative body is less important in an administrative agency.[4]

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[3] When these two interests cannot support the application of *Noerr-Pennington*, it seems insignificant whether we say that the activity fell outside the exemption or, though within its scope, the activity fell through the "sham exception" to the exemption. In this circuit, the sham exception was initially construed quite narrowly, *see Subscription Television, Inc. v. Southern California Theatre Owners Ass'n*, 576 F.2d 230, 233 (9th Cir.1978); *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d 1076, 1080—81 (9th Cir.1976), *cert denied*, 430 U.S. 940, 97 S.Ct. 1571, 51 L.Ed.2d 787 (1977), but has recently been given broader application, *see Clipper Exxpress*, 674 F.2d at 1262; *Ad Visor, Inc. v. Pacific Telephone and Telegraph Co.*, 640 F.2d 1107, 1109 (9th Cir. 1981): *Ernest W. Hahn*, 615 F.2d at 840—42. As we conceded recently: "There is no precise definition to the sham exception." *Id.* at 837 n. 8. We therefore decline to utilize the sham-exception analysis here in our examination of the interests upholding *Noerr-Pennington*.

[4] The types of acceptable public input may vary with the nature of the decision making process. In *California Motor Transport*, 404 U.S. at 513, 92 S.Ct. at 613, the Supreme Court noted: "Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." *Accord, Clipper Exxpress*, 674 F.2d at 1269—73.

While these two considerations are relevant, the Supreme Court has found them insufficient to avoid the application of *Noerr-Pennington*. In *California Motor Transport*, 404 U.S. at 510—11, 92 S.Ct. at 611—12, the Court explained:

[I]t would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors.

Budget asserts, however, that a third consideration vitiates *Noerr-Pennington* protections: the airports are operated essentially as commercial, profit-oriented enterprises. We find little significance in this fact. It is undisputed that the first amendment protects efforts to influence officials making essentially commercial decisions on behalf of a governmental entity. And while some types of public input may be incompatible with profit-oriented decision making, Budget has made no showing that Hertz or National engaged in any such activity at these airports.[5]

B. *A Commercial Exception to Noerr-Pennington*

The exaggerated significance Budget attributes to the operation of the airports as businesses results from its belief that *Noerr-Pennington* does not apply when the government engages in a purely commercial enterprise. In so reasoning, Budget confuses *Noerr-Pennington* with the very different doctrine of state-action immunity recognized in *Parker v. Brown*, 317 U.S. 341, 350—52, 63 S.Ct. 307, 313—14, 87 L.Ed. 315 (1943). *Parker* stands for the proposition that "the federal antitrust laws do not prohibit a State 'as sovereign' from imposing certain anticompetitive restraints 'as an act of government.'" *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 391, 98 S.Ct. 1123, 1125, 55 L.Ed.2d 364 (1978). Thus, whether the State is engaged in a commercial enterprise is relevant in determining the State's liability under *Parker*. *Id.*

When private parties persuade state officials to effectuate some anticompetitive policy, an antitrust plaintiff might name both the private parties and the State as defendants and thus implicate both *Noerr-Pennington* and *Parker*. Because their liability is

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[5] *See* footnote 1, *supra*.

governed by "two separate doctrines," *New Mexico v. American Petrofina*, 501 F.2d 363, 368 (9th Cir.1974), one defendant might be liable and the other exempt. *See City of Lafayette*, 435 U.S. at 399—400 & n. 17, 98 S.Ct. at 1129—1130 & n. 17 (noting the different interests protected by the two doctrines). It would be inapt to require symmetry.

When discussing both doctrines in a single opinion, courts tend to emphasize their similarities. As a result, language in opinions by three courts of appeals seems at first glance to support a commercial exception to *Noerr-Pennington*. *Hecht v. Pro Football, Inc.*, 144 D.C.App. 56, 444 F.2d 931, 940—42 (1971), *cert. denied*, 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972); *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1296—98 (5th Cir.1971), *cert. denied*, 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25, 31—34 (1st Cir.), *cert. denied*, 400 U.S. 850, 91 S.Ct. 54, 27 L.Ed.2d 54 (1970). Other courts have noted that these cases may recognize something resembling a commercial exception. *Kurek v. Pleasure Driveway and Park District of Peoria, Illinois*, 557 F.2d 580, 592—93 n. 10 (7th Cir.1977), *vacated and remanded*, 435 U.S. 992, 98 S.Ct. 1642, 56 L.Ed.2d 81 (1978); *Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters and Helpers Local No. 150*, 440 F.2d 1096, 1099 (9th Cir.), *cert. denied*, 404 U.S. 826, 92 S.Ct. 57, 30 L.Ed.2d 54 (1971). One court has even adopted the exception. *City of Atlanta v. Ashland-Warren, Inc.*, 1982—1 Trade Cases ¶ 64,527 at 72,926—29 (N.D. Ga.1981).

It is possible that *California Motor Transport* implicitly overruled *Hecht*, *Woods* and *Whitten*. *See Bustop Shelters, Inc. v. Convenience & Safety Corp.*, 521 F.Supp. 989, 996 (S.D.N.Y. 1981); *Reaemco, Inc. v. Allegheny Airlines*, 496 F.Supp. 546, 556 n. 6 (S.D.N.Y. 1980). Regardless, we do not construe this trilogy to support a commercial exception. All three courts properly couched their discussions of *Noerr-Pennington* in terms of the first amendment and the importance of free-flowing communication to government decision making. Their only possible flaw was presuming that decisions implementing rather than formulating policy (sometimes called "nonpolitical activity") do not implicate these two interests sufficiently to invoke *Noerr-Pennington* protection. They did not ignore the interests by

creating a commercial exception.

III. *Conclusion*

There is no commercial exception to *Noerr-Pennington*. Instead, the nature of the government activity is one factor in determining the type of public input acceptable to the particular decision-making process. Since Budget has given no reason for us to hold that the antitrust laws apply, we conclude that *Noerr-Pennington* exempts the concerted lobbying efforts of Hertz and National from the antitrust laws.

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE: AIRPORT CAR RENTAL ANTITRUST LITIGATION	)	**Master File No. MDL 338**
	)	
	)	**MEMORANDUM OPINION AND ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT**
THIS DOCUMENT RELATES TO ALL ACTIONS	)	
	)	

Decided April 16, 1981.
WILLIAM W. SCHWARZER, District Judge.

I. INTRODUCTION

With the advent of the modern jet liner, air transportation has become a form of mass transit. In 1979, some 317 million passengers were carried by commercial airlines in the United States.[1] As a consequence airports served by commercial airlines have become major transportation hubs providing a wide range of services to the travelling public. Among the most essential of these services are ground transportation to and from airports, such as bus, taxi and limousine-service, and car rental agencies and automobile parking facilities. The authorities operating public airports are engaged in a variety of ways in arranging to have such services provided. In the case of car rental companies, they lease space to the companies to maintain service counters and other facilities at airports. Access to such space to provide on-airport service is of value to car rental companies who have therefore competed vigorously for the limited space which airport authorities make available for that purpose.

This litigation is an outgrowth of that competition among car rental companies. In actions commenced in several districts, a number of car rental companies complained in substance that

[1] *The World Almanac and Book of Facts*, 1981. Figure represents number of revenue passengers enplaned.

The Hertz Corporation ("Hertz"), National Car Rental System, Inc. ("National") and Avis Rent a Car System ("Avis") engaged in joint activities to influence airport authorities to exclude competing companies from airports in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2).[2] In the particular action now before the Court on the motion of defendants Hertz and National for summary judgment, the plaintiff is Budget Rent A Car of Washington-Oregon, Inc. ("Budget"). Budget alleged that defendants engaged in a conspiracy to eliminate competition in the on-airport rental market and, in furtherance of that conspiracy, jointly influenced and engaged with airport authorities to adopt and enforce certain standards and requirements regarding eligibility to engage in on-airport car rental and the manner in which that business would have to be conducted. Budget alleged that those standards and requirements precluded it from competing in the on-airport car rental market at Portland and Eugene, Oregon and Seattle and Spokane, Washington.[3] Budget also alleged that defendants entered into contracts with airport authorities which prohibited other car rental operators from entering the on-airport market and established unreasonably high minimum guarantees, that they opposed applications of other car rental companies in bad faith, and that they fixed rental rates in the on-airport market.

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[2] These actions, and the districts in which they originated, are: *Texas Auto Services, Inc. v. Hertz Corp.*, et al. (W.D.Texas); *Pacific Auto Rental Corp. v. Hertz Corp., et al. (D.Hawaii); Pacific Auto Rental Corp. v. State of Hawaii, et al. (D. Hawaii); Trans Rent-A-Car, Inc. v. Hertz Corp. et al.* (N.D.Cal.); *Dollar Rent A Car Systems, Inc.. v. Hertz Corp.* (N.D.Cal.); *Budget Rent A Car Co. of Florida, et al. v. Hertz Corp., et al.* (S.D.Fla); *Brynic, Inc., et al. v. Hertz Corp., et al.* (S.D.Ohio); *Budget Rent A Car of Washington-Oregon, Inc., et al. v. Hertz Corp., et al.* (C.D.Cal.); *Brooksbank v. Hertz Corp., et al.* (D.Minn.); *Budget Rent A Car of Reno v. Hertz Corp., et al.* (C.D.Cal.); *DRC Industries, Inc. v. Hertz Corp., et al.* (S.D.N.Y.). They have been consolidated and transferred to this Court as MDL Docket NO. 338.

[3] Among the standards and requirements alleged were the following:

(i) Not allowing more than a given number of on-airport automobile rental concessions at any given airport:

(ii) Allowing only persons engaged in the automobile rental market on the national level to operate on-airport automobile rental concessions;

(iii) Allowing only persons with national credit card systems to operate on-airport automobile rental concessions;

(iv) Allowing only persons with national reservation systems to operate

Motions for summary judgment were previously filed by these defendants and denied while this litigation was assigned to a different judge of this court. *See In re Airport Car Rental Antitrust Litigation*, 474 F.Supp. 1072 (N.D.CAL.1979). The prior ruling held that defendants' joint actions to influence airport authorities were not exempt from the antitrust laws under the so-called *Noerr-Pennington* doctrine[4] because they were directed at commercial activities of those authorities. Following reassignment of these cases to this Court, defendants renewed their motions, albeit directed at a different plaintiff and with respect to different airports.

The Court is mindful of the institutional and policy considerations militating against reconsideration of an earlier ruling by a judge of the same court. As a rule, "the various judges who sit in the same court should not attempt to overrule the decisions of each other..." *Castner v. First National Bank of Anchorage*, 278 F.2d 376, 397 (9th Cir. 1960) (citing *Shreve v. Cheesman*, 69 F.

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on-airport automobile rental concessions;

(v) Allowing only persons with a given number of years of experience in the automobile rental market to operate on-airport automobile rental concessions;

(vi) Allowing only persons with experience as an on-airport automobile rental concessionaire at a given number of airports to operate on-airport automobile rental concessions;

(vii) Allowing only persons which operate an automobile rental business which features a rent-it-here, leave-it-elsewhere program to operate on-airport automobile rental concessions.

(viii) Prohibiting the advertising and soliciting of automobile rental customers at the airport location by persons not having on-airport automobile rental concessions;

(ix) Prohibiting persons not having on-airport rental automobile rental concessions from picking up and delivering automobile rental customers to the airport.

(x) Placing persons other than Hertz, Avis and National who operated on-airport automobile rental concessions at competitive disadvantages by placing such persons' facilities such as counters, parking lots, ready spaces, holding spaces and car washes at undesirable locations at the airport, and by not allowing such persons to have some of the facilities at the airport location at all.

(xi) Prohibiting the advertisement of Budget's Sears Rent-A-Car program.

[4] *Eastern Railroad Conference Presidents v. Noerr Motor Freight, Inc.* 365 U.S. 127, 81 S.Ct. 523, 5 LEd.2d 464 (1961); *United Mine workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965).

785, 791 (8th Cir. 1895)). This rule is premised upon principles of comity and uniformity, and the need to preserve the orderly functioning of the judicial process. *Castner, supra,* 278 F.2d at 379—80. But it does not raise an absolute bar to reexamining questions previously determined. It is well established in this circuit that one district judge in a multi-judge court may modify or overrule the interlocutory order of another judge sitting in the same case for "cogent reasons" or where "exceptional circumstances" are presented. *Greyhound Computer Corp. v. IBM,* 559 F.2d 488 (9th Cir. 1977), *cert. denied,* 434 U.S. 1040, 98 S.Ct. 782 54 L.Ed.2d 790 (1978); *United States v. Desert Gold Mining Co.,* 433 F.2d 713 (9th Cir. 1970); *Tanner Motor Livery, Ltd. v. Avis, Inc.,* 316 F.2d 804 (9th Cir.), *cert. denied,* 375 U.S. 821, 84 S.Ct. 59, 11 L.Ed.2d 55 (1963); *Castner, supra.* An order denying a motion for summary judgment is generally treated as interlocutory and subject to reconsideration by the court at any time. *Preaseau v. Prudential Insurance Co.,* 591 F.2d 74, 79—80 (9th Cir. 1979); *Pearson v. Dennison,* 353 F.2d 24, 28 (9th Cir. 1965). It makes no difference whether the interlocutory order is reconsidered by the same judge or by a different judge to whom the case has been reassigned. *Desert Gold, supra,* 433 F.2d at 715.

Whether to reconsider a question previously decided has been left to the district judge's sound discretion. *Greyhound, supra; Castner, supra.* The Ninth Circuit explored the relevant considerations in this way:

> We are concerned here with a second judge to whom a case has been assigned after a motion. . .for summary judgment [has] been denied by a prior judge and the case is set for trial. He is charged with the responsibility of conducting the trial to its conclusion. Yet after examination of the record he is firmly convinced that an error of law has been committed in denying the motions. He is faced with a dilemma: shall he defer here to the rule of comity and defer to the "erroneous" ruling of the first judge thereby allowing a useless trial to proceed, or shall he reverse the order of the prior judge and permit an immediate appeal, where he in turn may be reversed because he abused his discretion in overruling his colleague?
>
> Under such circumstances, we feel that there is no abuse of discretion in overruling the prior judge. The second judge must conscientiously carry out his judicial function in a case over

which he is presiding. He is not doing this if he permits what he believes to be a prior erroneous ruling to control the case. He can settle questions presently without compelling the parties to proceed with what may be a futile and expensive trial. We think that these are cogent reasons and exceptional circumstances which justify a departure from the rule of comity within the permissible limits of judicial discretion.

Castner, supra, 278 F.2d at 380.

It is argued that the prior judge's ruling should not be disturbed because it constitutes the "law of the case." That phrase, as the Ninth Circuit has observed, "has been used to describe the multiple situations in which one court considers prior rulings of its own or other courts both on the trial and appellate levels." *Castner, supra,* 278 F.2d at 379 n.3. *See also* Annot., 20 A.L.R.Fed. 13 at § 3(b) (1974); 1B Moore's Federal Practice ¶ 0.404[4]. Whether it should apply in the absence of an intervening appellate court decision is not settled. *See Castner, supra.* But even if it were applicable, it would not bar reconsideration of the prior ruling:

The law of the case is not entitled to the same respect as the doctrine of stare decisis. The law of the case does not demand obsequiousness right or wrong. Mr. Justice Holmes said that the phrase "law of the case" merely expressed the practice of courts generally to refuse to reopen what had been decided but was not a limit on their power. *Messenger v. Anderson,* 225 U.S. 436, 444, 32 S.Ct. 739, 740, 56 L.Ed. 1152 (1912). The only sensible thing for a trial court to do is to set itself right as soon as possible when convinced that the law of the case is erroneous. There is no need to await reversal. 1B Moore's Federal Practice ¶ 0.404[1], at 407. To modify the law of the case is primarily a matter of "good sense."

There is no suggestion of forum shopping in this case. That would not be sanctioned, but even that would not require us to affirm error. We held in *Bowles v. Wilke,* 175 F.2d 35, 37 (7th Cir.), *cert. denied,* 338 U.S. 861, 70 S.Ct. 104, 94 L.Ed. 528 (1949), that "[t]he only restraint upon a second judge in passing upon an interlocutory issue decided by another judge in the same case is of comity only, which in no way infringes upon the power of the second judge to act.

Champaign-Urbana News Agency, Inc. v. J. L. Cummins News

Co., 632 F.2d 680, 683 (7th Cir. 1980).

The implication of First Amendment rights presents a cogent reason for reconsideration where, as here, substantial doubts are raised concerning the validity of plaintiff's claims. The pendency of a meritless suit can itself chill the exercise of those rights. *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940, 97 S.Ct. 1571, 51 L.Ed.2d 787 (1977); *Federal Prescription Service, Inc. v. American Pharmaceutical Asso.*, 471 F.Supp. 126, 129 (D.D.C.1979). In addition, decisions by the Supreme Court subsequent to the prior ruling have helped clarify the permissible scope of regulation of commercial speech, *see, e.g., Central Hudson Gas & Electric Co. v. Public Service Cmssn.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), and mandate reconsideration.

Finally, considerations bearing on economy in the administration of justice cannot be ignored. The decision on this motion may be largely dispositive, not only of the Budget action but of the other pending actions as well. This litigation confronts the parties with potential burdens of staggering dimensions. The conduct of defendants at more than 100 airports has so far been placed in issue, and it is still an open question how many separate trials would be needed to adjudicate the claims against them. Accordingly, where a compelling showing has been made in support of a renewed motion for summary judgment, the motion should be entertained in the interest of justice albeit with appropriate deference to the prior ruling.

II. DEFENDANTS' ALLEGED ACTIVITIES FALL LARGELY OUTSIDE THE SCOPE OF THE SHERMAN ACT

The initial inquiry must be whether, and to what extent the claims asserted are cognizable at all under the antitrust laws. Those laws "were enacted for the protection of *competition*, not *competitors*," *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977) (emphasis in original). Thus it is not enough for plaintiffs to show that somehow they were disadvantaged in their business activities. They must show that the conduct to which they attribute their loss fell within the proscriptions of the Sherman Act intended to "[prevent]. . .restraints to free competition in business and

commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services. . ." *Apex Hosiery Co. v. Leader,* 310 U.S. 469, 493, 60 S.Ct. 982, 992, 84 L.Ed. 1311 (1940).

The combination or conspiracy complained of here is essentially among the defendant car rental companies.[5] But it is not asserted or shown that by their conspiratorial conduct they restricted or suppressed competition in the market for car rental services, or that they fixed prices,[6] divided markets, apportioned customers or restricted production. *Apex Hosiery Co. v. Leader, supra,* 310 U.S. at 469, 60 S.Ct. at 982. Taking plaintiff's claim at face value, the defendants conspired to influence the airport authorities to exclude plaintiff from access to the on-airport market. Access to that market is the relevant area of competition in this case, and plaintiff has offered no facts to show that it was barred from competing with defendants for contracts or leases with airport authorities, albeit under conditions not to its liking.[7] That the defendants may have acted jointly—even "collusively"—in dealing with airport authorities is irrelevant to the effects complained of by plaintiff, i.e., its alleged exclusion from the airports. If plaintiff suffered injury, it resulted from the acts of public officials declining to lease space to plaintiff, at least on terms acceptable to it, and not the joint action of defendants; that injury would have been the same had each defendant acted wholly independently in seeking to influence the authorities. Moreover, no complaint is made by airport authorities that *they* may have been deprived of the full benefits of competition among

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[5] The peripheral charge that defendants also entered into conspiracies with airport officials is discussed in part III. E, *infra.*

[6] Although plaintiff argues that the purpose and intent of defendants' exclusionary activities was to achieve a stabilization of prices in the on-airport car rental market, no evidence has been offered to show that defendants engaged in any joint activities to fix prices.

[7] *Compare California Transport v. Trucking Unlimited,* 404 U.S. 508, 512, 92 S.Ct. 609, 612, 30 L.Ed.2d 642 (1972), in which the "allegations [were] not that the conspirators sought 'to influence public officials,' but that they sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process." Plaintiff has offered no facts in support of a claim of denial of access to the airport authorities. *See* the discussion in part III. E., *infra.*

prospective lessees. On the contrary, plaintiff's complaint in effect is that defendants were seeking what amounted to exclusive leases and as an inducement offered competitive terms that were so favorable to the airports that plaintiff could not match them.

Proper analysis of this case, therefore, requires one to escape the tyranny of labels which is so often destructive of sound reasoning, particularly in the antitrust field. One must put aside those phrases of competition in the car rental field that are not involved here. There is no claim that defendants conspired with respect to the terms on which they rent cars to the public or otherwise limited or suppressed competition among them in the car rental market. Nor have any facts been offered indicating an agreement or conspiracy with airport authorities to exclude plaintiff from competing for leases or contracts with the airport.[8] The only agreement or conspiracy genuinely in issue here is one among these defendants to influence airport authorities to exclude plaintiff from the on-airport market and to grant defendants on-airport contracts or leases on terms which would have that effect.

Such an agreement imposes no restraint of trade. It may influence the airport authorities to restrict competition in the on-airport car rental market, but that restriction results from the decisions of the airport authorities as to the number of companies they allow to enter that market and the terms required of those companies, decisions which the airport authorities are necessarily authorized to make in the course of performing their function of managing the airports.[9] Any restraint therefore flows, not from the joint action of defendants, but from the airport authorities' exercise of their statutory authority and duty to manage the facilities in their charge.[10]

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[8] *See* note 5, *supra*, and part III. E. *infra*.

[9] *See* part III. D., *infra*.

[10] *See United Mine Workers v. Pennington, supra*, 381 U.S. at 671, 85 S.Ct. at 1594:

> It is clear under *Noerr* that Phillips could not collect any damages under the Sherman Act for any injury which it suffered from the action of the Secretary of Labor. The conduct of the union and the operators did not violate the Act, the action taken to set a minimum wage for government purchases of coal was the act of a public official who is not claimed to be a co-conspirator[.]

The issue of statutory interpretation addressed in this section should not be confused with the issue of causation. *Compare In re Airport Car Rental, supra,*

A careful reading of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., supra,* confirms that the Sherman Act does not reach the defendants' activities. The court there interpreted the scope of the act in the following words:

> We accept, as the starting point for our consideration of the case, the same basic construction of the Sherman Act adopted by the courts below—that no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws. It has been recognized, at least since the landmark decision of this Court in *Standard Oil Co. v. United States* [221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619], that the Sherman Act forbids only those trade restraints and monopolizations *that are created, or attempted, by the acts of "individuals or combinations of individuals or corporations."* Accordingly, it has been held that where a restraint upon trade or monopolization *is the result of valid governmental action, as opposed to private action,* no violation of the Act can be made out. These decisions rest upon the fact that under our form of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of government so long as the law itself does not violate some provision of the Constitution.
>
> We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly. Although such associations could perhaps, through a process of expansive construction, be brought within the general proscription of "combination[s]... in restraint of trade," *they bear very little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away*

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474 F.Supp. at 1099, *et seq.* The Court assumes for purposes of this motion that defendants' joint activities could be found by a trier of fact to have influenced decisions of airport authorities. That conclusion is independent, however, of the question whether those joint activities can be found to be a restraint of trade prohibited by the Sherman Act.

> *the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements.* This essential dissimilarity between an agreement jointly to seek legislation or law enforcement and the agreements traditionally condemned by § 1 of the Act, even if not itself conclusive on the question of the applicability of the Act, does constitute a warning against treating the defendants' conduct as though it amounted to a common-law trade restraint. And we do think that the question is conclusively settled, against the application of the Act, when this *factor of essential dissimilarity is considered along with the other difficulties* that would be presented by a holding that the Sherman Act forbids associations for the purpose of influencing the passage or enforcement of laws.

365 U.S. at 135—37, 81 S.Ct. at 528—29 (emphasis added). The quoted language, which perhaps has not received the attention it deserves, makes it clear that the *Noerr* decision rests on statutory interpretation, reinforced by First Amendment policies and considerations of federalism. To put it differently, *Noerr* holds that this kind of joint activity does not fall within the scope of the Sherman Act in the first place, not that it is removed from the act by an exemption. *See Cow Palace, Ltd. v. Associated Milk Producers, Inc.* 390 F.Supp. 696, 701 (D.Colo. 1975).[11]

The First Amendment has indeed been held to require the result reached in *Noerr*. In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510—11, 92 S.Ct. 609, 611—

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[11] If the Sherman Act does not reach agreements to influence the actions of others because they impose no restraint, it would be incorrect to treat such agreements as falling within an "exemption" or "immunity" provision subject to the presumption against repeal by implication. *See Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 399, 98 S.Ct. 1123, 1129, 55 L.Ed.2d 364 (1978), which, although referring to *Noerr* in the context of immunity, states that "a concerted effort by persons to influence lawmakers to enact legislation beneficial to themselves or detrimental to competitors *was not within the scope of the antitrust laws.*" (Emphasis added.) *See also, the dissenting opinion of Justice Stewart, 435 U.S. at 427 n.1, 98 S.Ct. at 1144 n.1.*

For that reason, it is also somewhat misleading to refer to a "Noerr-Pennington doctrine," since the question before the Court is not whether a doctrine or rule applies but whether particular activity is a restraint of trade. Subject to this cautionary note, the Court will nevertheless use the conventional terminology for the sake of brevity and convenience.

12, 30 L.Ed.2d 642 (1972), the Court said that "it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts. . ." But the First Amendment analysis is not a prerequisite for determining that joint action which imposes no restraint is not within the scope of the Sherman Act.

This is confirmed by the decision in *Parmelee Transportation Co. v. Keeshin,* 292 F.2d 794 (7th Cir.), *cert. denied,* 368 U.S. 944, 82 S.Ct. 376, 7 L.Ed.2d 340 (1961), in which plaintiff charged that the defendants had violated the Sherman Act by conspiring to shift a contract to provide transfer services among railroad stations in Chicago to a competing transfer company. The complaint attacked not the contract but the collusive activities that led to its adoption. It was established that the railroads had been induced to enter the contract by a conspiracy whose members engaged in improper activities. No First Amendment issue was perceived by the court. After distinguishing *United States v. Yellow Cab Co.,* 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947), in which a group of companies had entered into agreements to control the operation and purchase of taxicabs in major cities, the court said, in words bearing on the instant case:

> On the other hand, the record in the case at bar shows quite the contrary. No interested bidder for the contract was prevented from competing for it. Competition, which was formally opened in November, 1954 by solicitation of bids and brought bids from plaintiff, Transfer and Willett, proceeded for more than six months. The competition between plaintiff and Transfer was always intense and finally became feverish. Both competitors made adjustments in their propositions in their eagerness to secure the contract with the railroads. The case made out by plaintiff's offers of proof and evidence reflects the unusual attention which high officials of the railroads bestowed upon the bidding. An assertion that the competitive market for this contract was destroyed or that the competition for it was eliminated is belied by the record. While one competitor succeeded and necessarily the other failed, unmistakably there was very strenuous competition. This unavoidable fact undermines the plaintiff's charges under §§ 1

> and 2 of the Sherman Act. Nor is this result precluded by the fact (which a court might well find on the case presented by way of offers of proof) that the victory of the successful bidder was made easier by the wrongful conduct of a public official. Assuming the record presented as to his involvement reflects the truth (which we are for this purpose required to do), any party damaged thereby has (and would have had, even before the enactment of the Sherman Act) a ground for relief in the courts of this country. However, the use of conventional antitrust language in drafting a complaint will not extend the reach of the Sherman Act to wrongs not germane to that act, even though such wrongs be actionable under state law. We are not concerned with labels. Otherwise, an adroit antitrust lawyer might use his skill in the use of words to convert many unlawful acts into antitrust violations. The antitrust laws were never meant to be a panacea for all wrongs

292 F.2d at 803—04. *See also Security Fire Door Co. v. County of Los Angeles,* 484 F.2d 1028 (9th Cir. 1973); *Sterling Nelson & Sons, Inc. v. Rangen, Inc.,* 235 F.Supp. 393 (D.Idaho 1964), *aff'd.,* 351 F.2d 851 (9th Cir.1965), *cert. denied,* 383 U.S. 936, 86 S.Ct. 1067, 15 L.Ed.2d 853 (1966); *Southern Airways, Inc. v. Atlanta,* 428 F.Supp. 1010 (N.D.Ga.1977).

The instant case attacks joint action to influence the decisions of others, not to impose a restraint upon trade such as a division of markets, an agreement on prices or other suppression of competition. That kind of action falls outside the scope of the Sherman Act.

III. DEFENDANTS' ALLEGED ACTIVITIES ARE PROTECTED BY THE NOERR-PENNINGTON DOCTRINE

Although in the Court's view, the foregoing analysis substantially disposes of plaintiff's claims, in the interest of a complete disposition the other issues raised by plaintiff's contentions must be fully considered. In substance, it is plaintiff's argument that the *Noerr-Pennington* doctrine rests on First Amendment grounds, rather than statutory construction, and does not apply to activities intended to influence government officials engaged in commercial or proprietary functions, a view adopted in the prior ruling. *See In re Airport Car Rental, supra,* 474 F.Supp. at

1082—84, 1086 and 1090. The argument raises a series of issues:

A. Is there a commercial activity exception under *Noerr-Pennington;*

B. If the activities complained of retain a degree of First Amendment protection, are they subject to regulation by applying the Sherman Act;

C. Is the application of the Sherman Act to these activities supported by the decisions in *Parker v. Brown,* 317 U.S. 341 [63 S.Ct. 307, 87 L.Ed. 315] (1943), and in *Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389 [98 S.Ct. 1123, 55 L.Ed.2d 364] (1978);

D. If a commercial activity exception did exist, would it apply to the activities complained of here;

E. Are those activities in any event removed from protection under *Noerr-Pennington* by falling within the sham exception.

These issues are discussed in the following sections of this opinion.

A. *The so-called Commercial Activity Exception to the Noerr-Pennington Doctrine*

For purposes of this discussion, the Court assumes that the foundation for the so-called *Noerr-Pennington* doctrine rests on the First Amendment although, as heretofore observed, the First Amendment analysis appears to be superfluous to the determination that joint action which imposes no restraint does not fall within the Sherman Act.

The First Amendment analysis led the court in the prior ruling to apply a purported exception to the *Noerr-Pennington* doctrine for so-called commercial activity, i.e., joint action to influence government officials engaged in commercial or proprietary functions. The authority for such an "exception" was said to derive primarily from three decisions: *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.,* 424 F.2d 25 (1st Cir.), *cert. denied,* 400 U.S. 850, 91 S.Ct. 54, 27 L.Ed.2d 88 (1970); *Hecht v. Pro-Football, Inc.,* 444 F.2d 931 (D.C.Cir. 1971), *cert. denied,* 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972); and *Sacremanto Coca-Cola Bottling Co. v. Chauffeurs Loc.* 150, 440 F.2d 1096 (9th Cir.), *cert. denied,* 404 U.S. 826, 92 S.Ct. 57, 30 L.Ed.2d 54 (1971).

In *Whitten* the parties were manufacturers of prefabricated

"pipeless" pool gutters who sought to sell their products to public bodies acting under competitive bidding procedures mandated by state law. Plaintiff alleged that Paddock and its various dealers and representatives had violated Section 1 of the Sherman Act by conspiring to require the use of Paddock's own specifications in the public swimming pool industry with the intent to exclude others from bidding. Plaintiff also charged Paddock with making misrepresentations about Whitten and threats of litigation and harassment directed at Whitten and its customers. 424 F.2d at 27. Paddock moved for summary judgment, conceding for purposes of the motion that it had combined with others to effect the adoption of its specifications in the industry, that its specifications were drawn so that only it could comply, and that its purpose was to eliminate competition. The trial court, citing *Noerr,* held that all efforts to induce governmental bodies to take action, regardless of their motives, were immune from antitrust liability. The court of appeals reversed. The opinion contains a lengthy discussion of *Noerr* and *Pennington* and concludes that

> immunity. . .does not extend to efforts to sell products to public officials acting under competitive bidding statutes.

424 F.2d at 33.

For the following reasons *Whitten* is not authority for applying a commercial activity exception in this case:

First, the court's holding was limited to efforts to influence officials acting under competitive bidding statutes. By its terms, it does not apply to a case such as that before the Court in which the authority of the officials to restrict competition is uninhibited by the terms of the organic statutes.

Second, the case was decided prior to *Califoria Motor Transport, supra,* in which the Court expressly acknowledged that the protection accorded joint advocacy was not limited to political or policy matters but extended to "business and economic interests."[12] *Whitten* fails to address the question why

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[12] The court held:

> We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their

protection given to joint advocacy of private business and economic interests should be forfeited when public business and economic interests also become involved.

Third, the court based its decision on its understanding that "[t]he first amendment does not provide the same degree of protection to purely commercial activity that it does to attempts at political persuasion," citing *Valentine v., Chrestensen,* 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942) and *Breard v. Alexandria,* 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233 (1951). Six years after *Whitten,* however, the Court in effect refused to follow *Breard* and considered the continued validity of *Chrestensen* to have been questioned. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 759—60, 96 S.Ct. 1817, 1824, 48 L.Ed.2d 346 (1976). Moreover, that "the First Amendment does not prevent government from adopting reasonable rules for regulating the conduct of those who seek its favor," as the *Whitten* court observed, 424 F.2d at 33—34, does not support the conclusion that the antitrust laws are an acceptable form of such regulation.[13]

In *Hecht, supra,* a group of businessmen who had unsuccessfully sought to obtain a football league franchise for the District of Columbia sued the Washington Redskins, the National Football League and the District of Columbia Armory Board for violations of Sections 1 and 2 of the Sherman Act. Plaintiffs alleged that a restrictive covenant in the lease between the Redskins and the board prohibiting the use of Robert F. Kennedy Stadium by any professional football team other than the Redskins for a period of 30 years violated the prohibition against contracts in restraint of trade. 444 F.2d at 932. On cross motions for summary judgment, the trial court held that the leasing of the stadium pursuant to Congressional mandate was governmental action which, under *Noerr,* was exempt from the antitrust laws. The court of appeals reversed. In a wide-ranging opinion, it discussed various aspects of the antitrust laws including, with approval, the *Whitten* case. As for the applicability of *Hecht* to the instant case, however, it suffices to say that the

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competitors.

404 U.S. at 510—11, 92 S.Ct. at 611—12.

[13] *See* discussion in part III. B., *infra.*

issue there concerned not the lawfulness of joint action to influence public officials—no such action having been complained of—but the lawfulness of the stadium lease itself. The court's holding is summarized in the final paragraph of the opinion:

> On examination of the statute, the legislative history, the administrative practice, a comparison of the Stadium Act with other federal statutes referring or not referring to antitrust applicability, and the relevant cited cases, we do not find that the applicability of the federal antitrust laws has been excluded. We therefore hold that the validity of the thirty-year lease between the appellees Armory Board and Pro-Football, Inc., must be tested in accordance with the United States antitrust laws as usually applied to contracts between private parties.

444 F.2d at 947. The *Hecht* decision, therefore, has no direct bearing on the issues before this Court.

Finally, in *Sacramento Coca Cola, supra,* a soft drink bottler and vendor sued the Teamsters Union for antitrust violations by the alleged use of "threats, duress and other coercive measures" to induce California State Fair officials to forbid the sale of Coca-Cola on the fairgrounds. The district court had granted defendants' motion for judgment on the pleadings, relying on *Noerr* and *Pennington.* The court of appeals reversed on two grounds. First, it interpreted *Noerr* and *Pennington* as being limited to "political" activities, i.e., joint action "to attempt to influence the legislative or the executive with respect to the passage or enforcement of laws. . ." 440 F.2d at 1098 and 1099. The later decision in *California Motor Transport, supra,* rejects that narrow reading and must be considered as superseding the court's interpretation. Second, the court regarded threats and coercion to fall outside the protection afforded by *Noerr* and *Pennington.* 440 F.2d at 1099. That view is consistent with general principles governing the exercise of First Amendment rights,[14] but has no bearing on the disposition of the instant case.[15]

For the reasons discussed, therefore, none of the three

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[14] *See, e.g., Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834 (1949), holding that "the constitutional freedom of speech and press" does not immunize speech or writing that is an integral part of illegal conduct.

[15] *See also* discussion in part III. B., *infra.*

decisions can fairly be said to be authority for the existence of a generally applicable commercial activity exception to the *Noerr-Pennington* doctrine. Nevertheless, the breadth of the dicta in those opinions, and the weight attached to them in the prior ruling, make it appropriate to examine the possible bases for such an exception.

The Supreme Court has never recognized the existence of an exception for commercial activity under *Noerr-Pennington*[16]. In *Noerr*, it dealt only with activities to influence the legislative and executive department. It held that no violation of the Sherman Act can be predicated upon mere attempts to influence the passage or enforcement of laws, finding support for that holding not only in the language and purpose of the act but also in the need, first, to protect the power of government to take actions through its legislature and executive that restrain trade and, second, to protect the right to petition the government. 365 U.S. at 135-38, 81 S.Ct. at 528-30. While it acknowledged that application of the act to the facts in *Noerr* would result in regulation of "political activity," 365 U.S. at 137, 81 S.Ct at 529, it also signaled its subsequent holdings when it said that a

> . . . construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested *would thus deprive the government*

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[16] *Continental Ore. Co. v. Union Carbide*, 370 U.S. 690, 82 S.Ct 1404, 8 L.Ed.2d 777 (1962), has been cited as suggesting that the Supreme Court may have recognized a limitation on *Noerr* in a commercial context. *See In re Airport Car Rental, supra*, 474 F.Supp. at 1079. But that decision does not address the permissible scope of joint activites to influence public officials. It held, in effect, that *Noerr* afforded no defense to a charge that defendants sought to eliminate plaintiff from the Canadian vanadium market where defendants had allegedly conspired to that end with a wholly-owned subsidiary corporation of one defendant which had been appointed by the Canadian government as its exclusive agent to purchase and allocate to Canadian firms vanadium during a period of wartime shortages. Distinguishing *Noerr*, the Court said:

> Respondents were engaged in private commercial activity no element of which involved seeking to procure the passage or enforcement of laws. To subject them to liability under the Sherman Act for eliminating a competitor from the Canadian market by exercise of the discretionary power conferred upon Electro Met of Canada by the Canadian Government would effectuate the purposes of the Sherman Act and would not remotely infringe upon any of the constitutionally protected freedoms spoken of in *Noerr*.

370 U.S. at 707-08, 82 S.Ct. at 1414-15.

of a valuable source of information[.]

365 U.S. at 139, 81 S.Ct at 530 (emphasis added).

When *Pennington* came before the Court, it disposed of the antitrust claim almost summarily in these words:

> Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.

381 U.S. at 670, 85 S.Ct at 1593. The Court implicitly rejected any distinction between political or policy-making actions and commercial activities, applying the stated principle both to the defendants' joint approach to the Secretary of Labor to obtain establishment of a minimum wage for employees of contractors selling to the TVA and to the approach to the TVA to curtail its spot market purchases from exempt contractors, all intended to drive small coal operators out of business. 381 U.S. at 660-61, 670, 85 S.Ct. at 1588, 1593.

Finally, in *California Motor Transport, supra*, the Court addressed the application of the Sherman Act to concerted action before regulatory agencies to resist and defeat applications by competing carriers seeking operating rights. In holding such activities to fall within the ambit of *Noerr* and *Pennington*, the Court did not advert to any political or policy-making activites of the agencies involved. On the contrary, the opinion rests entirely on the rights of persons with common interests "to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors." 404 U.S. at 511, 92 S.Ct at 612. It is only when those activities transcend the limits of the First Amendment and, by reason of their "illegal or reprehensible" character, become a "sham" that they forfeit protection.

Not only is there no support for a commercial activity exception in the Court's opinions in the *Noerr-Pennington* line of cases, but such an exception is implicitly rejected in the Court's recent commercial speech decisions.[17] In *Virginia Pharmacy, supra*, the Court struck down a Virginia statute prohibiting licensed pharmacists from advertising prices of prescription drugs. Reasoning that the First Amendment protects not only the

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[17] *See* Note, The Supreme Court, 1979 Term, 94 Harv.L.Rev. 75, 159 (1980).

right to speak but the reciprocal right to receive communications, it held that compelling private and public interests precluded an exception for commercial speech:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. * * * And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.

425 U.S. at 765, 96 S.Ct at 1827. *See also Bates v. State Bar of Arizona*, 433 U.S. 350, 363-64, 97 S.Ct 2691, 2698-99, 53 L.Ed.2d 810 (1977); *Central Hudson, supra*, 447 U.S. at 561, 100 S.Ct at 2349.

Virginia Pharmacy extends a measure of First Amendment protection to commercial speech. It does so for reasons highly germane to the instant case, namely, that the free flow of economic information is indispensable to informed decision-making respecting the allocation of resources in our free enterprise system. The goals of commercial speech and antitrust thus are congruent rather than in conflict. If, as the decision reasons, the free flow of commercial information to private decisionmakers serves an important public interest, the flow of that information to public decisionmakers presents the *a fortiori* case. It is therefore difficult indeed to see how *Virginia Pharmacy* leaves room for a commercial activity exception to *Noerr-Pennington*.[18]

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[18] There would in any event be no rational basis for distinguishing between communications to private consumers and to government agencies acting in a commercial or proprietary capacity. *See George R. Whitten, Jr., Inc. v. Paddock Pool Builders Inc., supra*, 424 F.2d at 34. The government being the

Activities intended to influence public officials in making commercial decisions are entitled to protection not merely as proposals of a commercial transaction. Regardless of any collusion or purpose to gain a commercial advantage over competitors, they are a vehicle for communicating information to public officials. As the Supreme Court said in *Noerr*, it is poeple seeking official action to "bring about an advantage to themselves and a disadvantage to their competitors . . . who provide much of the information upon which governments must act." 365 U.S. at 139, 81 S.Ct. at 530. Commercial speech therefore enjoys First Amendment protection not only as an exercise of the right to speak and petition but also to guard the reciprocal right of the public, through its officials and agencies at all levels of government, to receive information. *Virginia Pharmacy, supra,* 425 U.S. at 757 and 765, 96 S.Ct. at 1823 and 1827; *Central Hudson, supra,* 447 U.S. at 563, 100 S.Ct at 2350. *See also First National Bank of Boston v. Bellotti,* 435 U.S. 765, 783, 98 S.Ct 1407, 1419, 55 L.Ed.2d 707 (1978); *Friedman v. Rogers,* 440 U.S. 1, 11 n. 10, 99 S.Ct 887, 895 n.10, 59 L.Ed.2d 100 (1979); *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85, 92, 97 S.Ct 1614, 1618, 52 L.Ed.2d 155 (1977).

B. *The Scope of Permissible Regulation of Commercial Speech*

Having concluded that activities intended to influence government officials engaged in commercial or proprietary functions are entitled to the degree of First Amendment protection accorded commercial speech, one must next determine whether application of the Sherman Act to such activities qualifies as constitutionally permissible regulation.

To say that commercial speech is entitled to protection under the First Amendment is, of course, not to decide where the limits of that protection lie. "[D]ecisions dealing with more traditional First Amendment problems do not extend automatically to this as yet uncharted area." *Friedman v. Rogers, supra,* 440 U.S. at 11 n.9, 99 S.Ct. at 895 n.9. In its most recent opinion in this area, the Court stated that its decisions have recognized the distinction between "speech proposing a commercial transaction which

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nation's largest consumer, any communication directed at consumers generally will likely be of as much interest to public officials as to private persons.

occurs in an area traditionally subject to government regulation and other varieties of speech . . . ." While "commercial speech . . . should not be withdrawn from protection merely because it proposed a mundane commercial transaction," *Bates v. State Bar of Arizona, supra,* 433 U.S. at 363-64, 97 S.Ct. at 2698-99, "[t]here is no reason for providing [the full panoply of First Amendment protections] when . . . statements are made only in the context of commercial transactions." *Central Hudson, supra,* 447 U.S. at 562 n.5, 100 S.Ct at 2349 n.5.

In a series of recent decisions, the Supreme Court has begun to plant guideposts in this previously uncharted area. In *Ohralik v. Ohio State Bar Assoc.,* 436 U.S. 447, 98 S.Ct 1912, 56 L.Ed.2d 444 (1978), it approved application of Ohio's disciplinary rule prohibiting the solicitation of clients to in-person solicitation of two young accident victims, one of whom at the time was confined in traction to a hospital room, the other having just returned home from the hospital. The Court considered the potential for overreaching established by the facts of that case sufficient to warrant enforcement of the rule of First Amendment-based objections. In *Friedman v. Rogers, supra,* the Court upheld a Texas statute prohibiting optometrists from practicing under tradenames, relying on experience in the state which showed that use of such names created a risk of deception. *See also Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations,* 413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973) (upholding enforcement against newspaper of antidiscrimination ordinance prohibiting the carrying of help wanted ads in sex-designated columns).

Those cases are distinguishable for the activities constituting the commercial speech in the instant case are not attacked as being false, likely to mislead or deceive, or related to unlawful activity. Attempts to influence public officials engaged in commercial functions do not fall into those rubrics; regardless of their anticompetitive purposes or effects, they are inherently lawful and cannot be analogized to the activities prohibited in *Ohralik* and *Friedman, supra.*

If the kind of commercial speech involved here is to be regulated, the regulation must meet the test articulated in *Central Hudson, supra,* in which the Court held:

> If the communication is neither misleading nor related to

> unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

447 U.S. at 564, 100 S.Ct. at 2350.

The prior ruling in this case, issued a year before *Central Hudson*, reasoned that the governmental interest in preserving free competition was sufficiently strong to justify application of the Sherman Act to attempts to influence public officials in the exercise of commercial functions. It announced a balancing analysis in which a choice between First Amendment protection and antitrust liability is made on a case-by-case basis, depending on whether the agencies sought to be influenced were local rather than state or federal legislatures, and were making commercial rather than policy decisions. *In re Airport Car Rental, supra,* 474 F.Supp. at 1085-87.

Central Hudson now forecloses that approach. Under that decision, commercial speech, while subject to restriction, does not forfeit all First Amendment protection. Any restriction of such speech, to be valid, must directly advance a substantial interest and must not be broader than necessary to achieve that objective.

The Sherman Act does not meet that test. It is not a regulation or restriction of protected activity narrowly tailored to serve a particular interest.[19] Instead it is a means of subjecting activities

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[19] An example of valid regulation of activity protected by the First Amendment is *United States v. Harriss*, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed.989 (1954), upholding the Federal Regulation of Lobbying Act. In that case, the defendants were charged with violations of the act requiring the filing by solicitors and recipients of quarterly reports disclosing the receipt of contributions and the expenditure of moneys for the purpose of influencing legislation. The Court

to *post hoc* review by a jury and imposing penal damages if the activities are found to have violated the act. Its application would inevitably chill conduct within the ambit of the First Amendment. *Franchise Realty, supra,* 542 F.2d at 1082; *Subscription Television v. Southern California Theatre Owners Asso.*, 576 F.2d 230, 233 (9th Cir. 1978).[20] Subjecting commercial speech to "regulation" under the antitrust laws is therefore incompatible with the First Amendment. *See California Motor Transport, supra,* 404 U.S. at 510-11, 92 S.Ct. at 611-12.

C. *The Impact of Parker v. Brown and its Progeny*

The prior ruling, finding a commercial activity exception under the *Noerr-Pennington* doctrine, rested in part on a perceived relationship to the principle of *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), as applied recently in *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978). In the latter case, the Court held that municipalities may be subject to antitrust liability for anticompetitive activities. Because such activities are often commercial, the ruling reasoned, anomalous and inequitable results would likely

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held that the act served a valid governmental interest, i.e., informing Congress who is being hired and who is providing funds, and how much, to influence legislation, and that the narrow construction given the act, requiring disclosure only by solicitors or recipients of such contributions, was a valid regulation of the exercise of First Amendment rights.

Undoubtedly, a state seeking to protect similar interests could, consistent with the First Amendment, impose registration and reporting requirements on persons seeking to influence the actions of public officials such as airport managers. But that is a far cry from federal courts applying the antitrust laws to the exercise of First Amendment rights, not only inhibiting the speaker but also interfering with the state's own interest in the free flow of commercial information to its public officials. This case would be the first to approve a curtailment of speech the effect of which would be to impair rather than to serve a legitimate governmental interest of a state.

[20] Although the Court has in the past indicated that the justification for applying the traditional overbreadth doctrine to commercial speech is relatively weak, given the profit motive behind it, *Virginia Pharmacy, supra,* 425 U.S. at 772 n.24, 96 S.Ct. at 1831 n.24; *Bates v. State Bar of Arizona, supra,* 433 U.S. at 380-81, 97 S.Ct at 2707, it has nevertheless made clear that a restriction is invalid if a more limited restriction will achieve the purpose. *Central Hudson, supra,* 447 U.S. at 563, 100 S.Ct. at 2350. *Cf. First National Bank of Boston v. Bellotti,* 435 U.S. 765, 785 n.21, 98 S.Ct. 1407, 1420 n.21, 55 L.Ed.2d 550 (1978).

follow if private attempts to induce them were immune under the Sherman Act. Fearing that private persons instigating anti-competitive commercial activity by municipalities might otherwise escape liability while the municipality itself could be held liable for engaging in it, the court concluded that the *Noerr-Pennington* doctrine, although "rooted in very separate principles," should be interpreted as being essentially coextensive with *Parker v. Brown*, i.e., applicable only to attempts to influence government action itself not subject to the antitrust laws. *In re Airport Car Rental, supra,* 474 F.Supp. at 1089-90.

Whatever appeal such a symmetrical interpretation might have, it is, as discussed above, incompatible with First Amendment protection extended to activities constituting commercial speech. Moreover, the symmetry is more apparent than real. Contrary to the implication of the prior ruling, municipal antitrust liability does not turn on the distinction between commercial/proprietary and governmental activities on which the ruling sought to make application of *Noerr-Pennington* turn. If the opinions in *Lafayette* make anything clear, it is that this distinction was unacceptable to eight of the nine members of the Court.[21] A majority of the Court agreed only that a municipality is a "person" within the meaning of the antitrust laws. 435 U.S. at 391 and 408, 98 S.Ct. at 1125 and 1134. Only a plurality joined in that part of the opinion which limited the state action exemption of *Parker v. Brown* to municipal activities conducted pursuant to state policy displacing competition with regulation or monopoly public service, and that limitation, being unnecessary to the decision, is only dictum. But even if it were adopted as the rule of the case it would not be a complement to *Noerr-Pennington.*

[21] It is evident from the concurring opinion of the Chief Justice, which the prior ruling quotes at length in reaching its conclusion, that he would have decided the case on the ground that the municipality was engaged in a proprietary enterprise. 435 U.S. at 418, 98 S.Ct. at 1139. Even that concept was expressly limited to the case where "all of the parties are in a competitive relationship such that each should be constrained . . . by the federal antitrust laws." 435 U.S. at 422 n.3, 98 S.Ct. at 1141 n.3, an element not present here. The plurality chose not to accept the Chief Justice's *ratio decidendi* and the four dissenters vigorously rejected it. But even if it were accepted, it would offer little support in a case such as this where the distinction is applied for the purpose of determining the antitrust liability not of the agency engaged in the activity but of third parties merely attempting to influence that agency.

While commercial activities by municipal agencies and activities not conducted pursuant to specific state policy or authority may indeed overlap considerably, these two types of activity are neither congruent nor necessarily or logically related.[22]

There is, moreover, no necessary or logical relationship between the imposition of liability on those who advocate anticompetitive activities and on those who participate in them. Even aside from First Amendment considerations, the Sherman Act prohibits participation in, not advocacy of, anticompetitive activities. Private parties attempting to influence public officials to engage in commercial activities which may later be found to violate the antitrust laws do not thereby become themselves liable. For liability to be imposed upon them, they must be participants in the scheme.[23]

Nor does the asserted relationship between *Noerr-Pennington* and *Parker v. Brown* find support in decisions on the converse proposition immunizing joint attempts to influence government action which is *not* subject to the antitrust laws. *E. W. Wiggins*

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[22] The difficulties created by this analysis are reflected in the prior ruling. *Compare In re Airport Car Rental, supra,* 474 F.Supp. at 1090 n.16; "[A]lthough the private parties may have been influencing 'commercial' activity of the state, they would probably escape liability as well . . . ." *with id.* at 1093 n.20; "This Court's earlier discussion of the interrelationship of *Parker* and *Noerr* should not be read as a holding that all attempts to influence government officials are immune under *Noerr* so long as the government action itself would be immune under *Parker*."

[23] This is the necessary inference from the decisions cited in the prior ruling. *In re Airport Car Rental, supra,* 474 F.Supp. at 1090. In *Duke & Company, Inc. v. Foerster,* 521 F.2d 1277, 1282 (3rd Cir. 1975), plaintiff alleged that the private companies and the public agencies and officials had entered into a conspiracy in violation of Section 1. The court said:

> Both *Noerr* and *Pennington* involved suits against private parties who had allegedly conspired to influence governmental action. In neither case was it alleged that the governmental entity had collaborated to promote the conspiracy. Where the complaint goes beyond mere allegations of official persuasion by anticompetitive lobbying and claims official participation with private individuals in a scheme to restrain trade, the *Noerr-Pennington* doctrine is inapplicable.

Similarly, in *Kurek v. Pleasure Driveway & Park Dist.,* 557 F.2d 580, 591-93 (7th Cir. 1977), it appeared from the summary of the pleadings and the court's discussion that plaintiffs were complaining of joint anticompetitive action by private parties and public officials. *But see* note 30, *infra.*

Airways, Inc. v. Massachusetts Port Authority, 362 F.2d 52, 56 (1st Cir.), *cert. denied*, 385 U.S. 947, 87 S.Ct. 320, 17 L.Ed.2d 226 (1966); *Metro Cable Co. v. CATV of Rockford, Inc.* 516 F.2d 220, 229 (7th Cir. 1975). The logic which dictates that joint attempts to influence exempt activities should be immune does not help answer the question whether liability should be imposed on joint action to influence activities which may not be exempt.

Finally, the analytical difficulties of this proposition are accompanied by grave practical problems which would be encountered in its administration. Persons contemplating joint activities to influence public officials cannot predict with any degree of certainty whether the officials or their agencies could in some future lawsuit be held liable under the antitrust laws for engaging in the activities sought to be influenced. The "enforcement of the antitrust laws requires rules which are both predictable and workable." *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1213 (9th Cir. 1977). Nowhere is this more true than where, as here, First Amendment values are also implicated.

The problems of uncertainty would be aggravated in a suit where only private parties defend, as is the case here. The lawfulness of the absent public officials' conduct cannot then be fully litigated. Yet defendants' liability may turn on the hypothetical liability of absent public officials. To the extent that liability is founded on mere speculation, the result would be plainly unfair.[24]

D. *The Governmental Nature of the Activities Which Defendants Sought to Influence*

Even if the Court were to adopt the exception for commercial activities urged by plaintiff, the question remains whether the relevant activities of the airport officials could be found to be anything other than governmental activities. Plaintiff's argument in support of applying a commercial activity exception, and the reasoning of the prior ruling, rest in essence on three factors:

(1) The relevant decisions affecting car rental companies were

[24] The discussion in the following section of this opinion addressing the factors said to govern the application of a commercial activity exception shows how vague and unpredictable such a rule would be. Firms engaged in legitimate efforts to enter into business relations with a public agency on the most favorable terms obtainable would have no way of predicting the degree of risk of antitrust litigation to which they may be exposed.

made by local municipal bodies not acting in a legislative capacity;

(2) Their decisions were not necessary to implement state legislative policies; and

(3) The decisions were motivated by sound business judgment and economic considerations.

As to the first factor, the protection afforded under *Noerr-Pennington* is not lost because the joint activities are directed at influencing local municipal bodies. The Court is aware of no authority supporting that proposition.[25] The analysis explicated in the preceding sections of this opinion, whether bottomed on interpretation of the Sherman Act or the First Amendment, leaves no room for a distinction between local municipal agencies and state agencies. The large number of such local agencies[26] demonstrates that much of the nation's governmental activity is necessarily conducted through them. To exclude them from the scope of the *Noerr-Pennington* doctrine would substantially frustrate its purpose.

As to the second factor, decisions concerning the leasing of space at airports to car rental companies are necessary to implement state legislative policies underlying the maintenance and operation of airports. Each of the relevant airports is operated by agencies created by the legislature and vested with

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[25] To the contrary, the *Noerr-Pennington* doctrine has been repeatedly applied to attempts to influence local agencies. *See e.g., Mark Aero, Inc. v. Trans World Airlines, Inc.*, 580 F.2d 288 (8th Cir. 1978) (city council); *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940, 97 S.Ct. 1571, 51 L.Ed.2d 787 (1977) (local board of permit appeals); *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975) (city council); *Bob Layne Contractor, Inc. v. Bartel*, 504 F.2d 1293 (7th Cir. 1974) (city council and zoning board); *Lamb Enterprises, Inc. v. Toledo Blade Co.*, 461 F.2d 506 (6th Cir.), *cert. denied*, 409 U.S. 1001, 93 S.Ct. 325, 34 L.Ed.2d 262 (1972) (city council); *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969) (county commission); *Wilmorite, Inc. v. Eagan Real Estate, Inc.*, 454 F.Supp. 1124 (N.D.N.Y. 1977), *aff'd*, 578 F.2d 1372 (2d Cir.) *cert. denied*, 439 U.S. 983, 99 S.Ct. 573, 58 L.Ed.2d 655 (1978) (zoning board of appeals, county planning board and town board); *United States v. Johns-Manville Corp.*, 259 F.Supp. 440, 452 (E.D.Pa.1966) ("local governmental authorities").

[26] There were said to be 62,437 different units of local government in the United States in 1972. *Lafayette v. Louisiana Power & Light Co., supra*, 435 U.S. at 407, 98 S.Ct. at 1133.

broad powers. The Seattle-Tacoma and Spokane airports operate under Washington law which declares that airports are a "public purpose." RCW 14.08.020. Under that statute, the "acquisition, establishment, construction, enlargement, improvement, maintenance, equipment and operation of airports . . . are . . . declared to be public, *governmental*, county and municipal *functions*, exercised for a public purpose, and matters of public necessity . . ." (Emphasis added.) Municipalities operating the airports are specifically empowered "to confer the privileges of concessions of supplying upon its airports goods, commodities, things, services and facilities" for the "rightful, equal and uniform use" of the public. RCW 14.08.120(4). Airport officials are further authorized to determine the proper charges, terms and conditions under which its properties, services and accommodations may be used, provided that "the public is not deprived of its rightful, equal and uniform use . . . ." RCW 14.08.120(6). The Sea-Tac Port District has the power to acquire, build, maintain, operate, develop and regulate air transfer and terminal facilities within its district. RCW 53.04.010. Its regulatory powers are considerable. It may "formulate all needful regulations for the use by tenants, agents, servants, licensees, invitees, suppliers, passengers, customers, shippers, business visitors and members of the general public by any properties or facilities owned or operated by it . . . ." RCW 53.08.220.

The Oregon airports operate under a similar grant. Oregon municipalities are empowered to "acquire, establish, construct, expand or lease, control, equip, improve, maintain, operate, police and regulate airports . . . ." ORS 492.310. All lands acquired in furtherance of this goal are used for "public and *governmental*" purposes. ORS 492.320 (emphasis added). The purpose and general powers of the Port of Portland are to promote the port's aviation interests, ORS 778.015, and to that end the port may take any "requisite, necessary and convenient" action. It is specifically empowered to "purchase . . . construct, operate, maintain, lease, rent . . . airports . . . and all other facilities incident to the development, protection and operation of the port and air transport . . . ." ORS 778.025(5).

These statutes reflect a clear legislative purpose to make the operation of these airports a governmental activity. That conclusion is consistent with decisions in other circuits. In *Amersbach v.*

Cleveland, 598 F.2d 1033 (6th Cir. 1979), the court held the operation of the Cleveland airport to be a governmental activity for purposes of the Fair Labor Standards Act (29 U.S.C. § 201, *et. seq.*), relying on these elements:

(1) the service benefits the community as a whole and is available to the public at little or no direct expense;

(2) the service is undertaken for the purpose of public service rather than for pecuniary gain;

(3) government is the principal provider of the service; and

(4) government is particularly suited to provide the service because of a communitywide need for it.

598 F.2d at 1037. *See also Mark Aero, Inc. v. Trans World Airlines, Inc.* 580 F.2d 288 (8th Cir. 1978).

If the maintenance and operation of a public airport is a governmental activity, there is no rational justification for bifurcating some parts of that activity into a nongovernmental category. The legislative enactments here clearly contemplate that the local airport authorities would lease space to and contract for services by private firms (inescapable features of operating an airport) and impose no restrictions on how this is to be done. Moreover, providing facilities for ground transportation is as essential as providing airline facilities themselves, for an airport which departing passengers cannot conveniently reach and arriving passengers cannot conveniently leave is of little use. As the court said in *Padgett v. Louisville & Jefferson County Air Board*, 492 F.2d 1258, 1260 (6th Cir. 1974):

> In the instant case, the state has legislatively created an instrumentality, the Air Board, whose charge is, inter alia, to operate the airport. There is no question in our own minds but that the regulation of ground transportation services is necessarily incident to the management and operation of the airport facilities. Air travelers require ground transportation and it would follow that the Board, as the agent of the state in performing this function, would have a duty to provide adequate and reliable services. In responding to this duty the Board has taken what we view as the not unreasonable position that noncontracting taxi operators may not provide services at the airport unless they first obtain the Board's permission. Given the circumstances of the public invitation for bids and the board statutory grant of power to manage and operate a

virtual monopoly in the public interest, we conclude that the Board in contracting for cab service at the airport was exercising a valid governmental function to which the antitrust laws do not apply.

See also E.W. Wiggins Airways, Inc. supra, (port authority's decision to enter into exclusive lease with airport fixed base operator was exercise of governmental function under state legislation authorizing it to operate airport).[27]

Power to lease space and contract for services necessarily comprehends authority to decide the amount of space to lease, the standards and requirements to be applied to the services, and the number and identity of the lessees and contractors. While business and economic considerations are implicated in such decisions, so are policy questions.[28]

This is not a case in which the agencies themselves are charged with having engaged in activities violating the antitrust laws. It must be distinguished from the cases in which the municipalities along with private parties were alleged to have engaged in exclusionary activities. *Cf. Woolen v. Surtran Taxicabs, Inc.*, 461 F.Supp. 1025 (N.D.Tex.1978); *Guthrie v. Genesee County, N.Y. Prior Aviation Service*, 494 F.Supp.950 (W.D.N.Y.1980). In those cases the governmental character of the activity under *Parker v. Brown* and *Lafayette* was critical to the application of the antitrust laws to the public agencies. No such issue is present here. Plaintiff has made no showing that the public agencies' actions defendants sought to induce were, or would have been unlawful in themselves and therefore not governmental.[29]

As to the third factor, the decisions of the public officials did

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[27] The *Padgett, Wiggins* and *Mark Aero* decisions are cited only for their analysis of what constitutes a governmental activity. Whether, in light of the subsequent decision in *Lafayette, supra,* they continue to be authoritative on the application of *Parker v. Brown, supra,* is a different issue which need not be addressed here.

[28] Among other things, airport authorities must take into account such obvious policy issues as environmental impact, equal employment opportunity, restrictions on available tax revenues, and the extent of competition desired among concessionaires.

[29] The allegations in the complaint that the airport authorities were coconspirators are discussed in the text at note 30.

not cease to be governmental by reason of being motivated by economic considerations and sound business judgment. That public activities should be stigmatized because they seek to maximize revenue is wholly without support either in precedent or reason, particularly in a period of economic stringency and governmental retrenchment.

It may be that activities undertaken for the primary purpose of pecuniary gain should be treated differently from governmental activity, but there is no evidence to suggest that the airports in question are operated for that purpose. *See Amersbach, supra,* 598 F.2d at 1037.

E. *The Application of the Sham Exception*

The so-called sham exception derives from the Court's statement in *Noerr* that

> [t]here may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.

365 U.S. at 144, 81 S.Ct. at 533. In *California Motor Transport, supra,* the Court elaborated on the concept. There the Court found a claim to have been stated where it was alleged that defendants conspired to harass and deter plaintiffs in their use of administrative and judicial proceedings so as to deny them access to the regulatory agencies from which they required operating authorities. 404 U.S. at 511, 92 S.Ct. at 612.

It is not necessary to explore fully the various applications of the sham exception to dispose of this case. It is clear enough that the exception may apply when processes which might otherwise be protected by the First Amendment are used not to advance a party's economic objectives but to inflict injury on another, as, for example, through the maintenance of a pattern of baseless litigation. *See Otter Tail Power Co. v. United States,* 410 U.S. 366, 380, 93 S.Ct. 1022, 1031, 35 L.Ed.2d 359 (1973). It may also apply when, through fraud or bribery, for example, these processes are corrupted. *See California Motor Transport, supra,* 404 U.S. at 513, 92 S.Ct. at 613. And it may apply where the public officials are themselves participants in the conspiracy. *See*

Federal Prescription Service v. American Pharmaceutical Asso., 484 F.Supp. 1195 (D.D.C.1980).

Defendants have denied engaging in any activities implicating the sham exception. At this stage of the litigation, plaintiff "may not rest upon the mere allegations . . . of [its] pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P.56(e); *see Mutual Fund Investors Inc. v. Putnam Management Co.*, 553 F.2d 620 (9th Cir. 1977); *ALW, Inc. v. United Air Lines, Inc.* 510 F.2d 52 (9th Cir. 1975); *First National Bank of Arizona v. Cities Services Co.*, 391 U.S. 253, 289-90, 88 S.Ct. 1575, 1592-93, 20 L.Ed.2d 569 (1968). The Court must therefore examine the facts put forward by plaintiff in response to this motion to determine whether they raise a genuine issue for trial.

(1) Port of Seattle,
Sea-Tac International Airport

Plaintiff claims that the lease agreements between the Port and the individual defendants contained "most favored nation" clauses; but in fact the relevant provision states:

> 14. NONEXCLUSIVE RIGHTS: It is mutually agreed that the rights, privileges and occupancy granted to the Lessee hereunder are nonexclusive and shall not in any way affect the right of the Port to make a similar agreement or agreements with other parties.

(Ex. 24 para. 14.) "While the agreements obligated the Port to charge all licensees the same minimum guarantee (Ex.46), they did not preclude it from negotiating and entering into lease agreements with another car rental company.

Plaintiff also offers evidence said to show that defendants' representatives coordinated their negotiations with the Port (Ex. 43), and met jointly with the Port officials to discuss the terms of the lease agreements (Ex.48) and to present standards and criteria which the Port should require of lessees, including minimum guarantees. (Ex. 49, 50.) Among the terms discussed were concession fees, defendants urging that if additional companies entered the market, the percentage fee to be paid by each should be reduced since no additional business would be generated and the existing business would be divided among more firms. (Exs. 52,54.) Also discussed were criteria which a

company should have to meet to provide airport service. (Exs. 53, 59, 60.) Finally, defendants participated in a series of meetings with Port officials in which they unsuccessfully opposed on economic grounds the entry of additional car rental companies into the on-airport market. (Exs. 60-64, 69.)

From the facts presented, viewed in a light most favorable to plaintiff, a trier of fact could find that defendants, separately and jointly, negotiated with the Port over the various terms of the lease agreements which, as finally executed, required car rental companies offering on-airport service to meet certain qualifications and pay guaranteed minimum fees, but did not preclude the Port from entering into such agreements with other companies. Even if a trier of fact could find that the terms for which defendants negotiated were favorable to them and unfavorable to plaintiff and served to delay plaintiff's entry into this market as claimed, these facts, if they state a claim cognizable under the Sherman Act at all, prove nothing other than a classic case for application of the *Noerr-Pennington* doctrine. They do not bring the case within the sham exception.

(2) Port of Portland,
Portland International Airport

As in the case of Seattle, the lease contracts between defendants and Portland were nonexclusive:

> The concession herein granted is not an exclusive concession and the Port shall have the right to deal with and perfect arrangements with any other individual, company or corporation for engaging in like activity at the airport; provided, however, that any other or future non-exclusive concession for U-drive operations shall not be on terms or conditions more favorable to said other or future concessionaire than are granted to Concessionaire herein, and provided further that, after receipt of applications for this concession at 2 P.M., Pacific Standard time, May 6, 1957, and after the Port has accepted the applications and executed contracts with at least one concessionaire, no future automobile rental concessionaire will be considered for or granted the right to operate at the Airport until at least two (2) years have elapsed from the commencement date of this agreement, said commencement date being more fully described in Article IV, herein, and

provided further that the term of lease of any future concessionaire shall not initially extend beyond the termination date of this lease.

(Ex. 32.) The evidence offered by plaintiff shows that in the early 1960's, a fourth car rental company operated at the Portland airport in addition to defendants but voluntarily discontinued operations. Defendants urged, although unsuccessfully, that the Port not permit another company to fill the space because experience had shown that there was insufficient business and offered to pay increased fees to compensate for any loss. (Exs. 72, 73, 74.) Subsequently defendants, along with Airways Rent-A-Car which also was a concessionaire at Portland, opposed a joint airline-car rental operation by which plaintiff would offer service at the airline's counter. (Ex. 75.)

Defendants jointly negotiated with the Port over modifications of their contracts and over problems created by off-airport operations. (Exs. 76, 77.) When Hertz sold some of its used cars, it advised the Port that employees would qualify for a "special $25.00 allowance off the sale price of the car." (Ex. 79.) Hertz also offered, as a door prize for the Port's employees Christmas Party, a free weekend rental. (Ex. 80.) And Avis sent a form letter to the Port's aviation manager, inviting him to accept membership in the Avis President's Club. (Ex. 81.)

Giving plaintiff the benefit of all favorable inferences, these facts would not permit a finding of a conspiracy between defendants and the Port or a denial of access. The sham exception is inapplicable.

(3) Spokane Airport Board,
Spokane International Airport

The facts show that at the urging of defendants, the airport adopted a qualifying fee for car rental companies which was finally reduced to $4,800. (Exs. 83, 84.) When plaintiff applied for space, defendants objected on the ground that there was an insufficient volume of business at the airport to support four licensees. (Exs. 85, 86, 87, 88, 89.) At a later time, Hertz and National stated that they would meet the competition of lower rates. (Ex. 93.)

There is here no evidence which could support application of the sham exception.

(4) Eugene Airport Commission, Mahlon Sweet Field

Plaintiff offers no evidence to support the application of the sham exception here.

Finally, plaintiff alleges that various airport authorities conspired with defendants to exclude it from the airports. While the validity and extent of a "coconspirator" exception to *Noerr-Pennington* are open to question,[30] the facts offered by plaintiff in support of its claim that airport officials were coconspirators are so patently deficient that the Court need not reach the question in this case.

In sum, on the facts offered by plaintiff, "there is no conceivable basis for arguing that defendants' conduct was a sham rather than a genuine effort to influence [official] action." *Metro Cable, supra,* 516 F.2d at 232. If plaintiff suffered injury, "it was caused by the governmental action which defendants genuinely attempted to secure . . . ." *Id.*

IV. CONCLUSION

The Court concludes that, as a matter of law:

(1) The activities of defendants complained of were not within

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[30] While under *Lafayette v. Louisiana Power & Light Co., supra,* public agencies and officials may in the proper case be subject to liability for violating the antitrust laws, whether private defendants may lose the protection of *Noerr-Pennington* because public officials collaborated with them is a different question. Two appellate decisions have so held in the context of passing on the sufficiency of pleadings only. *Harman v. Valley National Bank of Arizona,* 339 F.2d 564 (9th Cir. 1964); *Duke & Company, Inc. v. Foerster,* 521 F.2d 1277, 1282 (3rd Cir. 1975). *See also Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690, 707, 82 S.Ct. 1404, 1414, 8 L.Ed.2d 777 (1962), where the participant in the conspiracy was a private corporation to which official authority had been delegated by the government. Two courts have reached the contrary conclusion. *Sun Valley Disposal Co. v. Silver State Disposal Co.,* 420 F.2d 341, 342-43 (9th Cir. 1969); *Metro Cable Co. v. CATV of Rockford, Inc.,* 516 F.2d 220, 229-30 (7th Cir. 1975). The resolution of this apparent conflict may turn on whether the actions of the public officials were within the scope of their authority and whether the private activities, notwithstanding the collaboration, were genuine efforts to influence lawful official action. *Cf. Kurek v. Pleasure Driveway & Park Dist., supra,* 557 F.2d at 592-94. For purposes of this decision, however, the Court will assume that the coconspirator exception would be available to plaintiff.

the scope of the Sherman Act;

(2) Even if those activities were cognizable under the act, they are protected by the *Noerr-Pennington* doctrine

(a) regardless of whether they related to commercial activities by the public officials, or alternatively,

(b) because the activities sought to be influenced were governmental, and, in either case,

(c) because plaintiff has come forward with no facts to support application of the sham exception.

For the reasons stated, defendants are entitled to judgment against plaintiff Budget Rent A Car of Washington-Oregon, Inc. Because this ruling affects all of the other cases consolidated in this docket, the Court will defer entry of judgment. Plaintiffs in the other actions may, if they wish, file memoranda on or before May 18, 1981, stating why judgment should not be entered against them upon one or more of the grounds of this ruling. Any response by defendants shall be filed by June 8, 1981. The Court will thereafter advise the parties if a further hearing is deemed necessary before judgment is entered.

IT IS SO ORDERED.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE: AIRPORT CAR RENTAL ANTITRUST LITIGATION	**Master File No. MDL 338**
	MEMORANDUM OF OPINION
THIS DOCUMENT RELATES TO ALL ACTIONS	

Decided June 25, 1979.

CHARLES B. RENFREW, District Judge.

This consolidated multidistrict litigation involves eight actions brought pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, by Dollar Rent-A-Car System ("Dollar") and various licensees of Dollar and Budget Rent-A-Car Corporation ("Budget").[1] Defendants include The Hertz Corporation ("Hertz"), Avis Rent-A-Car System ("Avis"), and National Rent-A-Car System, Inc. ("National"). Plaintiffs allege a conspiracy to restrain trade in and to monopolize the on-airport car rental market in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1. 2.[2]

[1] The eight actions and the districts in which they originated, are as follows:
Budget Rent-A-Car Co. of Florida, Inc., et al. v. The Hertz Corp., et al. (S.D.Fla.);
Budget Rent-A-Car of Washington-Oregon, Inc., et al. v. The Hertz Corp., et al. (C.D. Cal.);
Brynic, Inc., et al. v. The Hertz Corp., et al. (S.D.Ohio);
Dollar Rent-A-Car Systems, Inc. v. The Hertz Corp., et al. (N.D. Cal.);
DRC Industries, Inc., et al. v. The Hertz Corp., et al. (S.D.N.Y.);
Pacific Auto Rental Corp., etc. v. The Hertz Corp., et al. (D.Hawaii);
Texas Auto Services, Inc. v. The Hertz Corp., et al. (N.D.Cal.);
Trans Rent-A-Car, Inc. v. The Hertz Corp., et al. (N.D.Cal.).
See In Re Airport Car Rental Antitrust Litigation. (J.P.M.L.1979), 459 F.Supp. 1006 (Jud. Pan.Mult.Lit.1978), 448 F.Supp. 273 (Jud.Pan.Mult.Lit. 1975). A ninth action, *Budget Rent-A-Car Corp., et al. v. The Hertz Corp., et al.* (N.D.Cal.), was settled and dismissed on February 8, 1979.

[2] Plaintiffs have alleged that defendants submitted bidding specifications and contractual provisions for on-airport car rental concessions that were designed

There are three motions presently before the Court.[3] The first, brought jointly by defendants Hertz, Avis, National, and an Avis licensee, seeks summary judgment in the actions affecting airports in Austin, Texas; Denver, Colorado; and Miami, Florida. This motion is based on two separate contentions: First, that the *Noerr-Pennington* doctrine immunizes defendants' conduct from the reach of the antitrust laws; and second, that that there is no casual connection linking defendants' actions with plaintiffs' alleged injury.

The second motion is directed primarily against plaintiff Dollar. *See infra*, at 1103 n.32. Defendants contend that Dollar has no standing under Section 4 of the Clayton Act to sue for damages with respect to airports from which its licensees were excluded. Defendants argue that the damage suffered by plaintiff as a result of the exclusion of its licensees is too remote or incidental to serve as a basis for standing.

Defendants' third motion is for a pre-trial order governing burden of proof. Focusing on plaintiff Dollar's intention to prove "fact of damages" by reference to a representative sampling of airports, defendants seek a pre-trial order pursuant to Rule 16 establishing that Dollar will not be entitled to damages with respect to airports for which no separate evidence has been presented.

The Court will address each of these motions in turn.

I. *NOERR-PENNINGTON*

In April 1977, before these actions were consolidated, defendants Hertz and Avis moved for partial judgment on the pleadings in No. C-75-2650-CBR, arguing that the *Noerr-Pennington* doctrine exempted their activities from the reach of the antitrust laws. After considering the parties' arguments and

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to exclude all competing car rental companies, agreed to oppose applications for on-airport concessions submitted by their competitors and did so in bad faith and through the use of misrepresentations, used bribery to gain the favor of airport officials and to induce them to exclude defendants' competitors from the on-airport market, and agreed to fix and to stabilize prices for on-airport car rentals throughout the United States.

[3] A fourth motion, seeking to strike Budget and Budget licensees' allegations of fraudulent concealment, was withdrawn without prejudice by defendants on February 29, 1979, pursuant to Local Rule 220-10.

undertaking a preliminary inquiry into the scope of the doctrine, this Court denied defendants' motion. Because there was "so much variation among the 140 airports involved in [the] action," and because "defendants themselves admit[ted] that '[t]he availability to defendants of * * * *Noerr* defenses [would] require proof at trial on an airport-by-airport basis,'" the Court concluded that defendants "failed to sustain their burden of showing that plaintiff can prove no set of facts that would remove its action from the *Noerr-Pennington* exception." *Dollar Rent A Car Systems, Inc. v. Hertz Corp.*, 434 F.Supp. 513, 517 (N.D.Cal. 1977).

Shortly after consolidation of the first seven actions, the Court entered a pre-trial order permitting defendants jointly to file a renewed motion for summary judgment predicated on *Noerr-Pennington* and authorizing full factual discovery directed at the airports chosen by defendants to be the focus of that motion. Defendants chose the airports in Austin, Texas; Denver, Colorado; and Miami, Florida, and undertook extensive discovery to support their claim. They then brought this motion, supplemented by a lengthy statement of facts and numerous exhibits. After having considered defendants' papers, plaintiffs' memoranda of facts and law in opposition, and the arguments of counsel, the Court concludes that defendants' motion must be denied as to its *Noerr-Pennington* defense.

A. *Background of the Noerr-Pennington Doctrine*

In *Eastern Railroads Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), a group of trucking companies and their trade association sued 24 railroads, a railroad association, and a public relations firm under Sections 1 and 2 of the Sherman Act. They alleged that defendants had entered into a joint conspiracy to influence legislative and executive action for the purpose of destroying competition in the long-haul freight business. The Supreme Court found the railroads' actions to be wholly immune from the antitrust laws, holding that a violation of the Sherman Act could not be predicated on mere attempts to influence the passage or enforcement of laws even if the purpose and effect of such influence was anti-competitive. 365 U.S. at 135-136, 81 S.Ct. 523. This conclusion rested on the necessity of preserving the in-

formed operation of governmental processes and of protecting the right of petition guaranteed by the First Amendment. 365 U.S. at 137-138, 81 S.Ct. 523, *see Franchise Realty v. S.F. Joint Exec. Bd.*, 542 F.2d 1076, 1080 (9 Cir. 1976), *cert. denied*, 430 U.S. 940, 97 S.Ct. 1571, 51 L.Ed.2d 787 (1977). In addition, the Court found that Congress had not intended to regulate "political activity," pointing to the "essential dissimilarity between an agreement jointly to seek legislation or law enforcement and the agreements traditionally condemned by § 1 of the Act." 365 U.S. at 136-137, 81 S.Ct. at 529, *see Kurek v. Pleasure Driveway & Park Dist.*, 557 F.2d 580, 592 (7 Cir. 1977), *vacated and remanded*, 435 U.S. 992, 98 S.Ct. 1642, 56 L.Ed.2d 81, *on remand*, 583 F.2d 378 (7 Cir. 1978), *cert. denied*, 439 U.S. 1090, 99 S.Ct. 873, 59 L.Ed.2d 57 (1979).

The Supreme Court reaffirmed and extended *Noerr* four years later in *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). In *Pennington*, a small coal mining company filed a cross claim under Sections 1 and 2 of the Sherman Act against the United Mine Workers, its trustees, and certain large coal operators, alleging a joint conspiracy to influence the Secretary of Labor and other government officials[4] to establish a high minimum wage for employees of contractors selling coal to the TVA. The intended victims of this conspiracy were the smaller coal companies operating in the TVA term contract market. 381 U.S. at 660, 85 S.Ct. 1585. Despite defendants' anticompetitive intentions, the Court determined that their conduct was protected from the reach of the antitrust laws. "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition," and even though the challenged conduct may be "part of a broader scheme itself violative of the Sherman Act." *Id.* at 670, 85 S.Ct. at 1593.

The most recent pronouncement of the Supreme Court in this area came in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). In

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[4] In addition to seeking to influence the Secretary of Labor, defendants sought to have the TVA restrict its spot market purchases of coal. These spot market purchases were exempt from the wage prescriptions of the Secretary. Thus, by influencing the TVA to restrict these purchases, defendants were attempting to support the higher minimum wage policy established by the Secretary.

California Motor the Court again affirmed the validity of the *Noerr-Pennington* doctrine and concluded that its protection should extend to joint activity to influence courts and administrative adjudicative bodies.[5]

Defendants rely heavily on *California Motor* in arguing that they are entitled to antitrust immunity because the airport officials they allegedly sought to influence were representatives of local administrative bodies. In response, plaintiffs make three arguments: First, that *Noerr-Pennington* does not immunize private parties who seek to influence officials acting in a commercial rather than in a governmental capacity; second, that defendants' actions fall within the "sham" exception to *Noerr-Pennington*; and third, that *Noerr-Pennington* does not immunize private parties who, rather than seeking merely to *influence* government officials, were actually acting *in concert* with them. Because the Court agrees with plaintiffs that defendants were seeking to influence government officials acting in a commercial or proprietary capacity, and that the *Noerr-Pennington* doctrine does not immunize such efforts from the reach of the antitrust laws, there is no need to address plaintiffs' second and third contentions.

B. *The "Commercial Activity" Exception to Noerr-Pennington*

1. *Case Analysis*

The Supreme Court has never created an explicit "commercial activity" exception to the *Noerr-Pennington* doctrine. None of the cases before it have turned on whether the government officials plaintiffs were seeking to influence were performing a commercial or proprietary rather than a governmental or policy-making function.[6] A number of lower courts have considered this

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[5] Plaintiffs in *California Motor* alleged a concerted effort by defendants to institute state and federal proceedings designed to interfere with and to defeat plaintiffs' applications for operating rights. Although the Court agreed that *Noerr-Pennington* protection extended into the administrative and judicial arenas, it found that plaintiffs had alleged conduct that would come within the "sham" exception to *Noerr*, and which would therefore not be immunized.

[6] *But cf. Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 US. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962). In *Continental Ore*, plaintiffs alleged that defendants had conspired to restrain trade and commerce in vanadium ore. As part of this conspiracy defendants allegedly directed their Canadian subsidiary,

issue, however, and it is upon these cases as well as upon the Supreme Court's latest pronouncements with respect to *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943),[7] that plaintiffs rely.

The primary case plaintiffs rely upon is *George R. Whitten, Jr. Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1 Cir.), *cert. denied*, 400 U.S. 850, 91 S.Ct 54, 27 L.Ed.2d 88 (1970), *on remand*, 376 F.Supp. 125 (D.Mass.), *aff'd*, 508 F.2d 547 (1 Cir. 1974), cert denied, 421 U.S. 1004, 95 S.Ct. 2407, 44 L.Ed.2d 673 (1975). In *Whitten*, a manufacturer and designer of swimming pool gutters and accessories, which was also a general contractor for the construction of swimming pool facilities, brought suit against a competitor and its dealers under Sections 1 and 2 of the Sherman Act. Plaintiff charged that defendants had conspired to influence public officials to adopt bidding specifications for construction of public swimming pools that were drafted to apply only to defendants' pools. Conceding the truth of this allegation for the purposes of the summary judgment motion, defendants

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which had been "appointed by the Canadian Government as its exclusive wartime agent to purchase and allocate vanadium for Canadian industry," to eliminate plaintiff from the Canadian market. 370 US. at 695, 82 S.Ct. at 1408. Although defendant argued that its actions were immune under *Noerr* because they involved an attempt to influence a governmental decision, the Court disagreed, stating:

> "[Defendants] were engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws. To subject them to liability under the Sherman Act for eliminating a competitor from the Canadian market by exercise of the discretionary power conferred upon [the subsidiary] by the Canadian Government would effectuate the purposes of the Sherman Act and would not remotely infringe upon any of the constitutionally protected freedoms spoken of in *Noerr*. *Id.* at 707-708, 82 S.Ct. at 1415.

[7] The Supreme Court in *Parker* relied on principles of federalism and state sovereignty in holding that the antitrust laws were not intended to be applied to states acting in a sovereign capacity. 317 U.S. at 350-351, 63 S.Ct. 307. Although the case is often described for the sake of simplicity as having created an antitrust "immunity" or an "exemption" from the antitrust laws, it more accurately should be considered a limitation on the scope or reach of the antitrust laws. *See City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 393 n. 8, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978); *Kurek v. Pleasure Driveway & Park Dist., supra*, 557 F.2d at 587 n. 5; *Duke & Co. v. Foerster*, 521 F.2d 1277, 1279 n. 5 (3 Cir. 1975); Handler, Antitrust—1978, 78 Colum.L.Rev. 1363, 1378 (1978).

nonetheless contended that their activities were protected under both *Parker v. Brown* and *Noerr-Pennington*.

The Court rejected both arguments. Regarding *Parker*, the Court agreed with defendants' general proposition that restraints of trade resulting from valid governmental action cannot give rise to private antitrust liability. 424 F.2d at 29. However, it concluded that "the adoption of [defendants' specifications by public bodies does not bring [defendants] within the exemption for valid governmental action." *Id.* at 31.[8] Turning its attention to *Noerr-Pennington* and defendants' contention that its challenged activity was a legally protected effort to influence public officials in the passage or enforcement of laws, the Court developed the commercial/governmental distinction that is at the heart of the summary judgment motion now before this Court.

The "key" to the *Noerr* decision, according to the First Circuit, was the Supreme Court's

> "heavy emphasis on the political nature of the railroad's activities and its repeated reference to the 'passage or enforcement of laws.' The entire thrust of *Noerr* is aimed at insuring uninhibited access to government *policy makers*. * * * By 'enforcement of laws' we understand some *significant policy determination* in the application of a statute, not a technical decision about the best kind of weld to use in a swimming pool gutter." *Id.* at 32 (emphasis added).

The Court further asserted that *Pennington's* broad language to the effect that "[j]oint efforts to influence public officials do not violate the antitrust laws * * *," 381 U.S. at 670, 85 S.Ct. at 1593, did not undercut this interpretation:

> "*Noerr* stressed the importance of free access to public officials vested with significant policy-making discretion. We doubt whether the Court [in *Pennington*], without expressing addi-

[8] In analyzing defendants' "state action" claim, the First Circuit correctly noted that "the assertion that an act is 'valid governmental action * * * suggests inquiry rather than ends it.' " 424 F.2d at 30 (citation omitted). It was convinced that "valid government action confers antitrust immunity only when government determines that competition is not the *summum bonum* in a particular field and deliberately attempts to provide an alternative form of public regulation." *Ibid.* Because there was no "anti-competitive" policy compelling the public bodies' decision-making in *Whitten*, the court refused to confer *Parker* immunity on defendants. *Id.* at 31. *See City of Lafayette, supra*, 435 U.S. at 413, 98 S.Ct. 1123.

tional rationale, would have extended the *Noerr* umbrella to public officials engaged in purely commercial dealings when the case turned on other issues." *Id.* at 33.[9]

Because of its conclusion that the *Noerr-Pennington* defense applied only to efforts to influence government officials acting in a non-commercial, policy-making capacity, the Court rejected defendants' reliance on the doctrine, holding that *Noerr-Pennington* "does not extend to efforts to sell products to public officials acting under competitive bidding statutes." *Ibid.* Moreover, after reaching this conclusion, the Court buttressed its case analysis with supporting First Amendment analysis:

"This conclusion does not, in our view, encroach on the freedom of speech and right to petition protected by the First Amendment. The First Amendment does not provide the same degree of protection to purely commercial activity that it does to attempts at political persuasion. *Cf. Valentine v. Chrestensen*, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942); *Bread v. City of Alexandria*, 341 U.S. 622, 641-643, 71 S.Ct. 920, 95 L.Ed 1233 (1951). Moreover, the First Amendment does not prevent government from adopting reasonable rules for regulating the conduct of those who seek its favor. *United States v. Harriss*, 347 U.S. 612, 625-626, 74 S.Ct. 808, 98 L.Ed 989 (1954)." *Id.* at 33-34.

The Court of Appeals for the District of Columbia Circuit employed a similar analysis in *Hecht v. Pro-Football, Inc.*, 144 U.S. App.D.C. 56, 444 F.2d 931 (1971), *cert. denied*, 404 U.S.

[9] Defendants have argued in the litigation before this Court that *Noerr-Pennington* could not be limited to attempts to influence the Government acting in a non-proprietary, policy-making capacity because *Pennington* itself involved an attempt to influence the TVA to restrict its spot purchases of coal, a purely commercial decision guided by economic criteria. The Court disagrees. As the decision in *Pennington* makes clear, the thrust of defendants' campaign was to eliminate the competition of smaller coal producers both by persuading the Secretary of Labor to establish a high minimum wage and by convincing the TVA to restrict its purchases of coal from producers who would not be subject to that minimum wage. The decision of the TVA, then, would appear to be based on the Secretary's actions. Rather than being guided by purely economic considerations, the agency would be expected to act in a manner that would be consistent with, and would not undercut, the policy decision reached by the Secretary. Its decision to restrict coal purchases from certain producers, therefore, would appear to incorporate policy and political considerations as well as economic considerations. *See Whitten, supra*, 424 F.2d at 32 n.7.

1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972). In that case, an unsuccessful prospective purchaser of a professional football team brought suit under the Sherman Act against the Washington Redskins, the National Football League, and the District of Columbia Armory Board, the agency entrusted with managing R.F.K. Stadium in Washington, D.C. The gist of the complaint was that defendants had conspired to restrain and monopolize the business of professional football by seeking and obtaining inclusion of a covenant in the stadium lease that prohibited the use of the stadium by any professional football team other than the Redskins for a period of 30 years.

In an opinion based primarily on *Parker*, the Court concluded that defendants were not outside the reach of the antitrust laws. The Court also rested its conclusion, at least in part, on the distinctions set forth in *Whitten*. *See* 444 F.2d at 940-941. In this part of its opinion the Court agreed that where the governmental agency is not in a position to make governmental policy, but is "obligated to carry out the policy as already made, * * * the rationale of *Noerr-Pennington*, guaranteeing access of private parties in combinations which would otherwise be illegal under the antitrust laws to influence such agency simply [would] not apply." *Id.* at 942. *See also Woods Exploration & Pro. Co., v. Aluminum Co. of Amer.*, 438 F.2d 1286, 1298 (5 Cir. 1971), *cert. denied*, 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972) ("action designed to influence policy * * * is all the *Noerr-Pennington* rule seeks to protect") *Oahu Gas Serv., Inc. v. Pacific Resources, Inc.*, 460 F.Supp. 1359, 1384-1385 (D. Hawaii 1978) ("if [defendants'] actions are not directed toward achieving a political result or affecting public policy, the *Noerr-Pennington* protections may not apply * * *").

The third case relied upon by plaintiffs in support of the "commercial activity" exception is *Sacramento Coca-Cola Bot. Co. v. Chauffeurs Loc. 150*, 440 F.2d 1096 (9 Cir.), *cert. denied*, 404 U.S. 826, 92 S.Ct. 57, 30 L.Ed.2d 54 (1971). There, a bottler and seller of soft drinks and a concessionaire and vendor of soft drinks sued the local, national, and international organizations of the Teamsters union, alleging that "due to threats, duress and other coercive measures exercised by the defendants upon the California State Fair officials, these officials issued a directive forbidding the sale of any Coca-Cola upon the fairgrounds

during the 1966 State fair." *Id.* at 1096. Like *Hecht, Sacramento Coca-Cola* was *not* decided on the ground that *Noerr-Pennington* is inapplicable to defendants who conspire to influence governmental bodies engaged in purely commercial decision-making. Rather, the Court of Appeals for the Ninth Circuit found *Noerr-Pennington* inapplicable because the doctrine did not extend to attempts to influence public officials "by means of threats, intimidation and other coercive measures." *Id.* at 1099. However, in reaching this result the Court expressly relied upon the First Circuit's conclusion that the exemption is limited to instances where the " 'attempt to influence a public official is the kind of political activity which *Noerr* protects.' " *Id.* at 1099, *quoting Whitten, supra,* 424 F.2d at 33. Accepting the First Circuit's view that attempts to influence "purely commercial dealings" are one type of political influence that *Noerr* does not protect, the Court concluded that attempts to influence through "threats and other coercive measures" are another. *Ibid.* In addition, the Court stressed that "[t]he basic thrust of [the Noerr and Pennington] decisions is political." *Ibid.*

Finally, this Court notes that the District Court for the District of Columbia has recently followed *Whitten, Hecht* and *Sacramento Coca-Cola* in a case where defendants were alleged to have influenced federal procurement decisions. *See General Aircraft Corp. v. Air America*, 1979-1 Trade Cases, ¶ 62,452, p. 76,672 (D.D.C. January 30, 1979). Noting that "[c]ourts have been reluctant to apply the *Noerr-Pennington* doctrine to attempts to influence government bodies acting in purely commercial matters such as procurement," the Court in *General Aircraft Corp.* concluded that "[i]n reaching a decision not to purchase plaintiff's products and service, none of the government entities acted in either a legislative, adjudicatory or administrative capacity so as to place defendant's actions within the reach of the *Noerr-Pennington* exception." *Id.* at 76,675-76,676.

Defendants do not dispute that these courts have impressed a "commercial activity" limitation upon *Noerr-Pennington*. Nor have they distinguished the great number of cases that have, at least in *dicta*, approved the *Whitten* line of analysis. *See, e.g., Council for Employment v. W H D H Corp.*, 580 F.2d 9, 12 & n. 11 (1 Cir. 1978), *cert. denied*, 439 U.S. 978, 99 S.Ct. 561, 58 L.Ed.2d 648 (1979); *Kurek, supra,* 557 F.2d at 592-593 n. 10,

593-594; *Security Fire Door Co. v. County of Los Angeles*, 484 F.2d 1028, 1030 n. 2 (9 Cir. 1973); *Israel v. Baxter Laboratories, Inc.*, 151 U.S.Appl.D.C. 101, 105, 466 F.2d 272, 276 (1972); *Woods, supra*, 438 F.2d at 1298; *Czajkowski v. State of Illinois*, 460 F.Supp. 1265, 1279 (N.D.Ill. 1977). *See also* Comment, *Whitten v. Paddock*, The Sherman Act and the "Government Action" Immunity Reconsidered, 71 Colum.L.Rev. 140, 151 (1971); Note, Application of the Sherman Act to Attempts to Influence Government Action, 81 Harv.L.Rev. 847, 852-854 (1968). They merely argue that this limitation is not soundly based, particularly in light of recent Supreme Court cases. The Court does not agree.

Defendants' primary contention is that *Whitten*, and the cases following it, rest on the supposition that "[t]he First Amendment does not provide the same degree of protection to purely commercial activity that it does to attempts at political persuasion." *Whitten, supra*, 424 F.2d at 33. This distinction, according to defendants, is no longer valid in light of the recent line of Supreme Court cases that purportedly "put 'commercial' speech, that is, speech directed entirely to effecting a commercial transaction, on the same First Amendment footing as 'political' speech." Memorandum in Support of Defendants' Joint Motion for Summary Judgment, at 67, *citing First National Bank v. Bellotti*, 435 U.S. 765, 783-874 n. 20, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350, 363, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 91, 97 S.Ct. 1614 52 L.Ed.2d 155 (1977); *Virginia State Board of Pharmacy v. Virginia Consumer Council, Inc.*, 425 U.S. 748, 770, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976); *Bigelow v. Virginia*, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975). Because the basis of the distinction no longer holds true, according to defendants, the distinction itself should be disregarded.

Before addressing the merits of this argument, the Court feels compelled to note that two of the cases relied upon by plaintiffs arose *after* the Supreme Court "commercial speech" cases cited by defendants. The first of these cases is *General Aircraft Corp., supra*, 1979-1 Trade Cases, ¶ 62,452, p. 76,672, decided in January 1979, in which the District Court for the District of Columbia reaffirmed the validity of the *Whitten* line of cases and

the commercial/governmental distinction. The second case is *Chestnut Fleet Rentals, Inc. v. Hertz Corp.*, Civ.Action No. 75-1889 (E.D.Pa. Sept. 20, 1978). Interestingly enough, *Chestnut Fleet Rentals* arose out of the same factual setting as some of the cases now before this Court. The court there, ruling in the fall of 1978, rejected defendants' position, holding that

> "the decisions of the governmental authorities in the matters complained of were of a commercial nature, not of a governmental nature. Thus, the decisions are made based upon economic criteria, and according to *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir. 1970), such conduct is not protected by the *Noerr-Pennington* doctrine of antitrust immunity. *See also Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *Hecht v. Pro-Football, Inc.*, [144 U.S.App. D.C. 56] 444 F.2d 931 (D.C. Cir. 1971) and *Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters and Helpers Local No. 150, et al.*, 440 F.2d 1096 (9th Cir. 1971)." Memorandum and Order at p.2.

Although this Court does not find that *Chestnut Fleet Rentals* has collateral estoppel effect as to all defendants and with regard to all airports involved in the current litigation,[10] it does appear that the Eastern District of Pennsylvania had an opportunity to consider defendants' argument that *Whitten* is no longer applicable. In conjunction with *General Aircraft Corp.*, the case certainly suggests that the *Whitten* line of cases remains valid and that defendants' arguments are not well founded.

a. *The Principles Underlying Noerr-Pennington*

Before analyzing and defining the contours of the commercial activity exception to *Noerr-Pennington*, the Court must address the issue of whether *Noerr-Pennington* is a doctrine based on statutory construction of the Sherman Act or whether it is based

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[10] The *Chestnut Fleet Rentals* case was reconsidered four and one-half months after it was decided. At that time, the court granted defendants' summary judgment motion "upon a finding that there was no casual connection between defendants' alleged antitrust violations at the nine airports involved in this litigation and plaintiffs' inability to obtain on-airport concessions, an issue not previously argued or decided." Order dated February 5, 1979 (E.D.Pa. Civ.Action No. 75-1889).

on an interpretation of the First Amendment. If the former, the court's analysis would center on the extent to which Congress intended all lobbying activities to be exempt from the Act, regardless of the commercial or governmental nature of the decision being sought. If the latter, the Court's analysis would focus on whether the First Amendment protects speech directed at influencing government officials acting in a commercial capacity, when that speech would otherwise constitute conspiratorial conduct prohibited by the Sherman Act.

In *Noerr,* the Supreme Court strongly suggested that its exemption was the result of statutory construction. Although it referred to the right of petition as an essential underpinning of its analysis, 365 U.S. at 137, 81 S.Ct. 523, the thrust of the Court's reasoning was that the Sherman Act could not have been intended to "prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly," *id.* at 136, 81 S.Ct. at 529, because such a result would "impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis *whatever in the legislative history of that Act." Id.* at 137, 81 S.Ct. at 529 (emphasis added). Moreover, the Court explicitly refrained from considering respondents' contention that their challenged activities were constitutionally protected by the First Amendment, stating that "Because of the view we take of the *proper construction of the Sherman Act,* we find it unnecessary to consider any of these other defenses." *Id.* at 132 n.6, 81 S.Ct. at 527 n.6 (emphasis added).

The sureness with which the Supreme Court stated the basis for its decision in *Noerr* was not challenged in *Pennington,*[11] but in *California Motor* the Court took a considerably more restrictive position. Relying on the First Amendment underpinnings of *Noerr,* the Court predicated its entire analysis on the tension between the right to petition as guaranteed by the First Amendment and the Congressional prohibition on anticompetitive restraints of trade. This perspective was particularly evident

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[11] In an interim case, however, *Continental Ore Co., supra,* the Court read *Noerr* as having rested on the need to avoid "serious constitutional barriers" to enforcement of the Sherman Act. 370 U.S. at 707, 82 S.Ct. 1404.

in the Court's statement:

> "We conclude that *it would be destructive of rights of association and of petition* to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors." 404 U.S. at 510-511, 92 S.Ct. at 612 (emphasis added).

Moreover, in developing the "sham" exception the court focused not on Congressional intent, but on the limits of the First Amendment. For example, it stated:

> "Petitioners['] * * * right of access to the agencies and courts * * * is part of the right of petition protected by the First Amendment. Yet that does not necessarily give them immunity from the antitrust laws.
>
> "It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." *Id.* at 513-514, 92 S.Ct. at 613.

And

> "First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils' [citation omitted] which the legislature has the power to control." *Id.* at 515, 92 S.Ct. at 614.

The Court concludes from its reading of *California Motor,* which is the most recent case setting forth the conceptual framework of *Noerr-Pennington,* that the doctrine represents a First Amendment limitation on the scope of the Sherman Act. *Accord, California Motor, supra,* 404 U.S. at 516-517, 92 S.Ct. 609 (Stewart, J., concurring); *see* Handler, Twenty-Five Years of Antitrust, 73 Colum.L.Rev. 415, 434—435 (1973). The Court finds considerable legal support for this conclusion. *See e. g., City of Lafayette, supra.* 435 U.S. at 399—400 n.17, 98 S.Ct. 1123; *Continental Ore Co., supra,* 370 U.S. at 707—708, 82 S.Ct. 1404; *Subscription T.V. v. Southern Cal. Theatre Owners,* 576 F.2d 230, 233 (9 Cir. 1978); *Kurek, supra,* 557 F.2d at 593—594; *Whitten, supra,* 424 F.2d at 29 n.4; *General Aircraft Corp., supra, ¶ 62,452 at 76,675; D. Fischel, Antitrust Liability for Attempts to Influence Government Action: The Bases and Limits*

of the Noerr-Pennington Doctrine, 45 U.Chi.L.Rev. 80, 95—96 & n.89 (1977). *But see Cow Palace Ltd. v. Associated Milk Producers,* 390 F.Supp. 696, 700—702 (D.Colo.1975). As a result, the Court's inquiry must be directed to the question of whether defendants can successfully attack the *Whitten* line of cases by arguing that the First Amendment prohibits all restraints on a private party's efforts to influence government officials, regardless of whether the government officials are acting in a proprietary or a governmental capacity.

2. *First Amendment Analysis*

There are two responses to defendants' contention that *Whitten* has been undercut by the recent line of Supreme Court "commercial speech" cases. First, although the Court has concededly elevated commercial speech to a level that more closely approximates the level enjoyed by political speech, it has certainly not merged the two. To the contrary, the Court has stressed that commercial speech, even more than political speech, may be regulated in the face of a compelling government interest. Second, although one of the sources of the First Circuit's First Amendment analysis in *Whitten* was a somewhat discredited line of freedom of speech cases, that court also relied on *United States v. Harriss, supra,* 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989, a case standing for the proposition that Congress may restrict the right to petition where such restriction is necessary to protect the public against a substantive evil.

a. *Commercial Speech*

Despite defendants' suggestion to the contrary, commercial speech is not "on the same First Amendment footing" as political speech. Rather, because commercial speech is often easier to verify than political speech, and because—due to the financial incentives of commercial "speakers"—commercial speech is often "hardier" than political speech, the Supreme Court has retained a distinction between the two. *See, e.g., Bates v. State Bar of Arizona,* 433 U.S. 350, 380—381, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *Linmark Assocs., Inc. v. Town of Willingboro,* 431 U.S. 85, 98, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977); *Va. State Bd. of Pharmacy v. Va. Citizens Consumers Council, Inc.,* 425 U.S. 748, 771—772 & n.24, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976).

Moreover, while the First Amendment grants "a limited measure of protection" to commercial speech, "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 456, 98 S.Ct. 1912, 1919, 56 L.Ed.2d 444 (1978); *see Savage v. Commodity Futures Trading Comm'n,* 548 F.2d 192, 197 (7 Cir. 1977).

The power of a state to regulate commercial speech in the face of a potential "evil" was most recently affirmed in *Friedman v. Rogers,* 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed.2d 100 (1979), a case involving a challenge to a Texas statute that prohibited the practice of optometry under a trade name. The Court recognized that a trade name is "a form of commercial speech that has no intrinsic meaning" and "conveys no information about the price and nature of the services offered * * *." 440 U.S. at 12, 99 S.Ct. at 895. As a result, "there is a significant possibility that trade names will be used to mislead the public" *Ibid.* Because the Court found that "the State's interest in protecting the public from the deceptive and misleading use of optometrical trade names" was strong enough to override any First Amendment protection afforded that type of commercial speech, it held that the challenged statute was constitutional. *Id.* at 15, 99 S.Ct. at 897. *Friedman* is thus fully consistent with previous authority indicating that a state may regulate commercial speech when it has a "substantial and well-demonstrated" interest in doing so to protect the public. Moreover, *Friedman* reaffirms that a court should scrutinize commercial speech with greater care than it should scrutinize political speech in determining whether there is a valid governmental justification for regulation.

Congress's primary purpose in enacting the antitrust laws was to protect the public against anticompetitive restraints of trade, or, as the Supreme Court has put it, in "preserving free and unfettered competition as the rule of trade." *Northern Pac. Ry. Co. v. United States,* 356 U.S. 1, 4, 78 S.Ct. 514, 517, 2 L.Ed.2d 545 (1958). The issue before this Court is whether that governmental interest is sufficiently strong to warrant imposition of restrictions on commercial speech, i.e., attempts to influence public officials in the exercise of non-policymaking, proprietary functions, even though it may not be strong enough to warrant imposition of restrictions on political speech, i.e., attempts to

influence public officials in the exercise of non-commercial, governmental functions. The Court finds that it is.

As the Supreme Court noted in *United States v. Topco Associates,* 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972):

> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy. Cf. *United States v. Philadelphia National Bank,* 374 U.S. 321, 371, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963)."

405 U.S. at 610, 92 S.Ct. at 1135.

This is strong language indicating an equally strong government interest in protecting the public and the public economy by maintaining free competition as the rule of trade. Although it must yield to the First Amendment rights of speech and petition when the government is acting in a policy-making capacity, the Court concludes that when commercial speech is involved—when defendants are seeking to influence the purely commercial functions of government—the governmental interest in maintaining the integrity of the antitrust laws must take precedence.

"Immunity from the antitrust laws is not lightly implied." *California v. Fed. Power Comm'n,* 369 U.S. 482, 485, 82 S.Ct. 901, 903 8 L.Ed.2d 54 (1962); *see also City of Lafayette, supra,* 435 U.S. at 399, 98 S.Ct. 1123 ("overarching and fundamental" policies represented in antitrust laws argue against implied exclusions). Because of the strength of the governmental interest involved, and because of the Supreme Court's recognition that greater restrictions may be placed on commercial speech than on political speech, the Court holds that when the government is acting in a purely commercial capacity, as, for example, a buyer or seller of goods, the antitrust laws should be applied as though plaintiffs had alleged a conspiracy to influence a large commer-

cial customer in its commercial decisionmaking. Given the broad intrusion of government into our everyday economic affairs, and given the "potential of serious distortion of the rational and efficient allocation of resources" that results from the independent economic decisions of governmental bodies, *see City of Lafayette, supra,* 435 U.S. at 408, 98 S.Ct. at 1134, a blanket application of *Noerr-Pennington* to all attempts to influence government officials would be unwarranted.

b. *Harriss*

The validity of the Court's balancing approach to *Noerr-Pennington* is supported by the Supreme Court's similar approach to cases involving the right to petition, the First Amendment right that lies at the heart of the *Noerr-Pennington* doctrine. One example of this approach is *United States v. Harriss, supra,* 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989, one of the cases upon which the First Circuit relied in *Whitten.* In *Harriss,* the Supreme Court heard a challenge to the constitutionality of the Federal Regulation of Lobbying Act, legislation that required Congressional lobbyists to register and periodically to file reports listing expenditures made to influence the passage or defeat of legislation. *Id.* at 614, 74 S.Ct. 808. Recognizing that this statute infringed upon defendants' right to petition and right to freedom of speech, the Court nonetheless felt constrained to balance that infringement against the acknowledged "evil" that Congress sought to prevent. Because of its deference to Congressional concern that "the voice of the people may all to easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal," *id.* at 625, 74 S.Ct. at 816, the Court upheld the statute.

It is significant that the Court did not distinguish between the right to petition and the right to freedom of speech in its analysis. Nonetheless, this is not surprising. The Court generally does not distinguish the right to petition from other First Amendment rights. *See, e. g., United Mine Workers of America v. Illinois State Bar Ass'n,* 389 U.S. 217, 222, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967); *Thomas v. Collins,* 323 U.S. 516, 530, 65 S.Ct. 315, 89 L.Ed. 430 (1945); D. *Fischel, supra,* 45 U.Chi.L.Rev. at 81 & n.13. Perhaps this is because the values expressed by these rights—ensuring that the public and the government possess all

information necessary for informed decisionmaking—are so similar. *Compare Noerr, supra,* 365 U.S. at 137, 81 S.Ct. 523, *with Associated Press v. United States,* 326 U.S. 1, 20, 65 S.Ct. 1416, 89 L.Ed. 2013 (1944). Whatever the reason, it supports this Court's determination that the restrictions that may be placed on freedom of speech are roughly comparable to the restrictions that may be placed on the right to petition.

The Court's analysis cannot stop here, however, because the right to petition seems to be subject to even greater restrictions than the right to freedom of speech. These restrictions are suggested most strongly by *California Motor, supra.*

In *California Motor,* the Court reaffirmed the broad proposition that the right to petition is not absolute. However, it went further and indicated that the scope of the permissible restrictions on that right depends in part on the nature of the government forum being petitioned. In the administrative forum, where greater restrictions may be imposed than in the legislative forum that was the focus of *Noerr,* a private party has no First Amendment right to petition the Government by means of perjury, fraud, payment of bribes, or misrepresentations. *See California Motor, supra,* 404 U.S. at 512—513, 92 S.Ct. 609. The Constitution does not protect that type of petitioning. *Accord, Mountain Grove Cemetery v. Norwalk Vault Co.,* 428 F.Supp. 951, 955 (D.Conn. 1977) ("[C]orrupt practices that abuse administrative or judicial tribunals can prompt the removal of antitrust immunity").[12] As this Court's discussion of *City of Lafayette* will indicate, *infra,* pp. 1087—1091, this distinction may be critical, insofar as the airport officials allegedly being influenced were representatives of local administrative, adjudicatory bodies. For that reason, defendants' attempts to invoke the First Amendment must be viewed with greater scrutiny than if, for example, they had approached a state legislative body.

The Court's analysis of *Noerr-Pennington* and the First

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[12] Moreover, as the "sham" exception to *Noerr-Pennington* indicates, defendants may not assume the mantle of the right to petition to cover activity that is intended, not to influence public officials, but rather to deny "their competitors * * * meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process." 404 U.S. at 512, 92 S.Ct. at 6123. "[A]ctions of that kind cannot acquire immunity by seeking refuge under the umbrella of 'political expression.' " *Id.* at 513, 92 S.Ct. at 613.

Amendment rights upon which it rests can be summarized in four statements. First, the right to petition and to freedom of speech may be restricted in the face of a compelling state interest. *See Giboney v. Empire Storage Co.*, 336 U.S. 490, 502, 69 S.Ct. 684, 93 L.Ed. 834 (1939). Second, among such compelling interests may be the interest of government in preserving the fundamental policies expressed in the antitrust laws. *See Nat'l Soc. of Prof. Engineers v. United States*, 435 U.S. 679, 696—697, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978); *City of Lafayette, supra*, 435 U.S. at 400, 98 S.Ct. 1123; *Associated Press v. United States*, 326 U.S. 1, 19—20, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945); *cf. Savage, supra*, 548 F.2d at 197 (First "Amendment does not remove a business engaged in the communication of information from general laws regulating business practices"). Third, this government interest may be given considerably greater weight when commercial speech is involved, that is, when the government activity being influenced is of a commercial rather than a political or policy-making nature. *See Council for Employment, supra*, 580 F.2d at 12; *State of Missouri v. Nat'l Org. for Women*, 467 F.Sup. 289 at 304 (W.D.Mo. 1979); *Oahu Gas Serv., Inc., supra*, 460 F.Supp. at 1384—1385. Fourth, the First Amendment interest may be given less weight when defendants are seeking to petition local governmental units or adjudicatory bodies rather than state or federal legislatures. *See California Motor, supra*, 404 U.S. at 512—513, 92 S.Ct. 609; *Oahu Gas Serv., Inc., supra*, 460 F.Supp. at 1385 (defendants' attempts to influence government officials "are subject to closer scrutiny because they occurred in an adjudicatory setting"). It is this "balancing analysis, which is fully consistent with the results reached in the *Whitten* line of cases, that the Court must apply in evaluating defendants' *Noerr-Pennington* defense in the cases at bar.

3. *City of Lafayette Analysis*

The Court's decision to retain *Noerr-Pennington's* commercial/governmental distinction is prompted not only by its First Amendment analysis but also by its desire for consistent application of the laws. Recent cases following *Parker v. Brown* have established that local government units and their officials are not entitled to "state action" immunity solely by virtue of their governmental status. Rather, their immunity depends on

the degree to which their anticompetitive activities were undertaken to implement state policy. In light of this limitation, the Court is concerned that rejection of the commercial/governmental distinction would lead to the anomalous result that where a municipality is engaged in commercial activity, but is not implementing a state "anticompetitive" policy, the decisionmaking municipal officials would be subject to antitrust liability even though the private parties who prompted their anticompetitive conduct would not, simply because the private parties sought to influence "government officials."

In *City of Lafayette, supra,* the Supreme Court reaffirmed that municipalities are not automatically exempted from the antitrust laws by *Parker.*[13] It is significant that the Court's decision in part rested on its concern that these independent decisionmaking

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[13] This result followed naturally from the Court's earlier decisions in *Goldfarb v. Va. State Bar,* 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), and *Bates v. State Bar of Arizona,* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977). In *Goldfarb,* the Court rejected a state bar association's claim that its publication and enforcement of minimum-fee schedules for lawyers was exempted state action. The Court noted that no state statute referred to lawyers' fees or minimum-fee schedules and that the State Supreme Court did not require either the use of, or adherence to, minimum-fee schedules. For these reasons, it concluded that the fee-setting was not an act of government performed by the State acting as sovereign. 421 U.S. at 791, 95 S.Ct. 2004. "The State Bar, though acting within its broad powers, had 'voluntarily joined in what is essentially a private anticompetitive activity,' * * * and was not executing the mandate of the State." *City of Lafayette, supra,* 435 U.S. at 410, 98 S.Ct. at 1135, *quoting Goldfarb, supra,* 421 U.S. at 792, 95 S.Ct. 2004.

In the second case, *Bates,* the Court reached the opposite result, extending the *Parker* exemption to a state bar association that helped enforce a rule prohibiting attorney advertising. The primary difference between *Goldfarb* and *Bates* was that in the latter case, the challenged activity was directed and authorized by the State Supreme Court; the prohibition against legal advertising was "a clear articulation of the State's policy with regard to professional behavior" and was "subject to pointed re-examination by the policy-maker—the Arizona Supreme Court—in enforcement proceedings." 433 U.S. at 362, 97 S.Ct. at 2698. As the Court later stated:

> "We emphasized [in *Bates*] the significance to our conclusion of the fact that the state policy requiring the anticompetitive restraint as part of a comprehensive regulatory system, was one clearly articulated and affirmatively expressed as state policy, and that the State's policy was actively supervised by the State Supreme Court as the policymaker." *City of Lafayette, supra,* 435 U.S. at 410, 98 S.Ct. at 1135.

bodies might have a potentially disruptive effect on the national economy:

> "When [municipalities and other local units of government] act as owners and providers of services, they are fully capable of aggrandizing other economic units with which they interrelate, with the potential of serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender." 435 U.S. at 408, 98 S.Ct. at 1134.

Although principles of federalism require that states themselves be permitted to engage in such anticompetitive economic conduct, a plurality of the Court held that "[i]n light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws * * *," the *Parker* doctrine must be limited to exempt "only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." *Id.* at 412—413, 98 S.Ct. at 1137. The Court therefore placed a significant limitation on the extent to which each local governmental unit could pursue its independent economic policies and still remain exempt from the scope of the antitrust laws.

The Chief Justice, in a concurring opinion that is of particular interest to this Court, agreed with the general conclusions of the plurality but focused more specifically on the commercial nature of the municipal activity being challenged. He indicated that the commercial activities of a municipality should be treated no differently than the commercial activities of private entities, stating:

> "This case turns, or ought to, on the District Court's explicit conclusion, unchallenged here, that '[t]hese plaintiff cities are engaging in what is clearly a business activity; activity in which a profit is realized.' There is nothing in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), or its progeny, which suggests that a proprietary enterprise with the inherent capacity for economically disruptive anticompetitve effects should be exempt from the Sherman Act merely because it is organized under state law as a municipality." *Id.* at 418, 98

S.Ct. at 1139 (footnote omitted).
He concluded that when municipalities are engaged in commercial or proprietary activity, that is, the same type of activity any other "entrepreneur in the economic community" might engage in, they should be subject to the antitrust laws absent a "strong showing" that the state "compelled" the challenged activity and that this compulsion was "essential" to the state's regulatory plan. *Id.* at 425—426 & n.6, 98 S.Ct. 1123.[14] *See also Czajkowski v. State of Illinois,* 460 F.Sup. 1265, 1279—1280 (N.D.Ill.1977) ("the state action exemption is more likely to be applied where the plaintiff's claim is directed against a public * * * rather than a private party, * * * where the challenged activities flow from an affirmative command of the legislature rather than the acquiescence of a state regulatory agency, * * * where the governmental unit concerned is the state itself rather than [a] municipality or other subordinate state governmental body, * * * and where the state program is enacted for the public good rather than to further private financial objectives.").

Because the Supreme Court has declared that municipalities and their officials are subject to antitrust liability when their activities are not necessary to implement state policies—and because of the suggestion that municipalities engaging in commercial activities are often not acting pursuant to articulated state policies—an interpretation of *Noerr-Pennington* that rejected the commercial/governmental distinction would be likely to lead to inequitable results. Perhaps the most obvious example of this would be the situation where private parties had influenced a municipal body to engage in a purely commercial, anticompetitive activity that was either contrary to state policy, or at least not related to state policy. Under *City of Lafayette,* this type of activity would subject the municipality and its officials to potential liability under the antitrust laws. Yet if *Noerr-Pennington* were interpreted to immunize efforts by private parties to influence *any* type of governmental decisionmaking, the private parties who instigated such activity would themselves be immune from the antitrust laws. While it is true that *Noerr-Pennington*

[14] This Court is certainly mindful of Justice Stewart's well-reasoned opinion in dissent in *City of Lafayette. See id.* at 426-441, 98 S.Ct. 1123. However compelling that opinion might be, though, this Court, as a District Court, must base its analysis on the opinion of the plurality.

and *Parker v. Brown* are legal doctrines rooted in very separate principles—the right to petition versus sovereign immunity and federalism—the Court feels constrained to consider their practical interrelation in order to avoid potentially inequitable or anomalous results.[15] And it certainly seems inequitable to hold a municipal official liable for actions he took at the urging of a private party while ruling that the private party is immune solely because it acted through the agency of that municipal official.[16] *Cf. Duke & Co., Inc. v. Foerster*, 521 F.2d 1277, 1282 (3 Cir. 1975) (*Noerr-Pennington* inapplicable where private parties and public officials are alleged to be co-conspirators); *Harman v. Valley Nat'l Bank*, 339 F.2d 564, 566 (9 Cir. 1964) (same). For these reasons, it seems appropriate to restrict the *Noerr-Pennington* doctrine to attempts to influence government officials who are engaged in activity that would be protected from the reach of the antitrust laws.

The Court of Appeals for the Seventh Circuit appeared to be influenced by this same desire to interpret *Parker* and *Noerr* in a consistent fashion in *Kurek, supra*. 557 F.2d 580. At issue in

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[15] This is not at all a novel idea. In fact, one of the bases for the Supreme Court's decision in *Noerr* was its earlier holding in *Parker* that "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out." *Noerr, supra*, 365 U.S. at 136, 81 S.Ct. at 529. The Court is therefore not breaking new ground in suggesting that the reach of *Noerr-Pennington* may be limited to cases in which the Government's conduct would itself be immunized. *See infra*, at 1090-1091.

[16] Retention of the commercial/governmental distinction would make just as much sense if the challenged action, although of a commercial nature, were performed by the state acting as sovereign. In that case, under *City of Lafyaette* and *Parker*, neither the state nor its officials would be subject to antitrust liability. Moreover, although the private parties may have been influencing "commercial" activity of the state, they would probably escape liability as well, thus averting the type of anomalous result with which this Court is concerned. As one court has stated:

> "[I]t should be noted that the only conduct of the [private] defendants * * * alleged to have been in violation of the antitrust laws had to do with their dealings with the Authority in the exercise of a governmental function. If, as we have found, the Authority's conduct was lawful here it would be an unreasonable restriction on its freedom to hold that the other defendants acted illegally in having aided it." *E. W. Wiggins Airways, Inc. v. Mass. Port Authority*, 362 F.2d 52, 56 (1 Cir.) *cert. denied*, 385 U.S. 947, 87 S.Ct. 320, 17 L.Ed.2d 226 (1966); *see also Saenz v. University Interscholastic League*, 487 F.2d.1026, 1028 (5 Cir. 1973).

Kurek was whether the antitrust laws would apply to a park district and one of its concessionaires which allegedly conspired to coerce the concessionaire's competitors into raising and fixing retail prices. 557 F.2d at 585—587. After a lengthy discussion of the Park District's statutory authority to engage in the challenged activity, the court concluded that the District was not entitled to a *Parker* defense, because

> "[n]othing in the Illinois statutory provisions governing park districts even remotely suggests that Illinois has authorized, let alone compelled, park districts to attempt to enrich themselves by coercing horizontal retail competitors operating under concession licenses to fix retail prices in what would otherwise be plain violation of the Sherman Act." *Id.* at 590.

Having disposed of the District's state action defense, the Court focused its attention on the *Noerr-Pennington* issue. That issue was based on the private concessionaire's presentation to the Park District of a "sham" proposal that would be used by the district to coerce the other concessionaires into the illegal price-fixing activity. *Id.* at 593. Resting rested its conclusion in part on its previous *Parker* analysis, the Court held that *Noerr-Pennington* offered no defense:

> "Our determination [under *Parker*] that the Park District and its officials had no state mandate or authority to engage in the activities attacked here necessarily reduces the applicability of the reasoning of *Noerr* to the degree it is based on the need of the governmental units for citizens input in making decisions that *Parker* holds to be outside the scope of the Sherman Act." *Id.* at 593.

That is, the Court found that the rationale of *Noerr-Pennington* would not extend to attempts to influence government officials acting in a manner that was not protected "state action" under *Parker.*[17] *Accord, Huron Valley Hospital, Inc. v. City of Pontiac,*

[17] The same court had adopted the correlative of that principle in *Metro Cable Co. v. CATV of Rockford, Inc.* 516 F.2d 220 (7 Cir. 1975). First, it held that a city council was entitled to *Parker* immunity because its decision to grant a monopolistic cable television franchise to plaintiff's competitor had been made in direct conformity with articulated state policy. *Id.* at 228-229. Then, it concluded that "[s]ince the governmental actions of the city council and its committees were not themselves subject to the Sherman Act, the same was true under *Noerr* of concerted efforts to induce those government actions * * *." *Id.* at 229.

466 F.Supp. 1301 at 1315 (E.D.Mich. March 2, 1979) ("* * * *Noerr-Pennington* immunity presupposes *Parker v. Brown* immunity: if the governmental or agency action is valid as under state authority (despite anticompetitive effects), then seeking to influence the action and a successful outcome are also exempt").

There are two conclusions that can be drawn from the Court's *City of Lafayette* analysis. First, whenever possible, the *Noerr-Pennington* doctrine should be applied in a manner that is conistent with *Parker;* that is, the courts should be reluctant to extend immunity to private parties who have sought to influence government activity that would not be protected under the state action doctrine. Second, in evaluating whether the governmental activity would be unprotected (and indirectly, whether the private parties who sought to influence it should be subject to the antitrust laws), the courts should consider the extent to which the governmental body is a subordinate unit of the state, acting in its own parochial interest rather than in the interest of implementing a particular state-policy, and it should also consider the extent to which the governmental body is performing a commercial function comparable to the functions performed by other large entities making decisions in the market place.

4. *Summary of Legal Analysis*

The Court recognizes that its First Amendment right to petition analysis and its *City of Lafayette* state action analysis do not exactly coincide. Nonetheless, some broad conclusions can be drawn from the two lines of authority. Foremost among these is the conclusion that a private party cannot be granted *Noerr-Pennington* immunity solely on the basis of having been part of a joint effort to influence government officials. Although there can certainly be no *Noerr-Pennington* immunity without such an effort, once an attempt to influence government officials has been found, there remain at least two other issues for the courts to consider.

First, the courts must ask whether the public officials allegedly being influenced were acting in a commercial or a governmental capacity. As *Whitten* and this Court's First Amendment analysis indicate, a private party's right to petition the government for redress of grievances must yield to the compelling governmental interests expressed in the antitrust laws when the public body

being "petitioned" is acting as a commercial entity influenced by economic concerns rather than as a policymaking unit of government. This need to differentiate between the commercial and the governmental functions of government officials is reinforced by *City of Lafayette,* particularly Chief Justice Burger's analysis, which indicates that the antitrust laws may apply with greater force to governmental units acting in an independent commercial capacity.

Second, the Court must ask what type of governmental body is being petitioned and how many levels removed it is from the legislature. As noted in *California Motor, supra,* a party's right to petition may be subject to closer scrutiny when the object of the petition is an administrative rather than a legislative body. Moreover, in order to be consistent with the state action doctrine as developed in *City of Lafayette,* a party's right to petition may be subjected to greater controls when the object of the petition is a local governmental body, particularly when it is acting as an independent economic entity rather than as an agent of state "anticompetitive" policy.

As Justice Stewart suggested, dissenting in *City of Lafayette,* there is no clear line dividing the "proprietary" from the "governmental" activities of a governmental body. *See* 435 U.S. at 433—434, 98 S.Ct. 1123. But this Court must conclude that as the decisionmaking function of a governmental body becomes more commercial, focusing on economic criteria rather than on policy considerations, and as the decisionmaking body becomes further removed from the legislative forum in the sense that it is either an administrative or adjudicatory body or an independent unit not carrying out state policy, the *Noerr-Pennington* doctrine must offer correspondingly less protection to the private parties who seek to assert their influence. The mere fact that the object of their influence is a government official should not be cause for granting an exemption from the antitrust laws.

C. *Application of the Commercial Activity Exception: The Test Airports*

There is only an element left to this Court's analysis, but it is by far the most important. To this point, the Court has been concerned with whether a "commercial activity" exception to *Noerr-Pennington* even exists. Now that it has resolved that

issue, and has further sought to outline the dimensions of the exception, the Court must turn to the cases at bar and determine the validity of defendants' argument that the local airport officials they allegedly influenced were engaged in "governmental activity."

Defendants' argument is based on a number of factors. First, they point to state statutory enabling provisions that authorize the creation of local airport authorities. Next, they refer to deposition testimony indicating that the operation of each test airport was guided by the primary goal of public service, and that in deciding to restrict entry onto the airport car rental market the local officials were making policy decisions based upon consideration of the public need, the available space, and the airport's revenue needs. Finally, they note that airport operation and management have been characterized as a government function by various statutes and court decisions. *See* Defendants' Joint Motion for Summary Judgment *(Noerr-Pennington* and Causation), at 6—7.

Plaintiffs, on the other hand, argue that the decisions of the local airport officials regarding the awarding of car rental concessions, like the decision as to which swimming pool specifications to adopt in *Whitten,* which soft drink concession to award in *Sacramento Coca-Cola,*[18] and which aircraft to purchase in *General Aircraft Corp.,* were decisions characterized by their proprietary rather than their governmental nature. Plaintiffs contend that the airport officials had no legislative mandate to make decisions having an anticompetitive effect and that the car rental concession decisions were made, not to institute any governmental policy, but merely to maximize the airport's revenues. Business judgment rather than the interests of the public was alleged to have been the touchstone of the decision-making process.

The Court has given careful consideration to the arguments raised and the authorities cited by all parties. Although there is some appeal to defendants' contention that the local airport authorities were acting merely as governmental officials engaged in a policymaking function, the Court must deny defendants' summary judgment motion as to all three airports. Because of the nature of the governmental decisionmaking bodies, the extent of

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[18] *But see supra,* at 1081.

their legislative mandate, and the factors entering into their decisionmaking process, the Court is unable to conclude that the airport authorities were functioning in a "governmental" capacity.

1. *Defendants' Cases*

Before discussing the particular facts at each of the test airports, the Court must address defendants' contention that a finding of "governmental activity" is compelled by prior case law. Defendants rely on three cases in making this argument. None are controlling.

In *Mark Aero,* Inc. v. Trans World Airlines, Inc., 580 F.2d 288 (8 Cir. 1978), the only case cited by defendants that involved application of *Ncerr-Pennington* to an attempt to influence airport officials, a private air taxi operator sought to have Kansas City Municipal Airport reopened so that it could offer air passenger service between Kansas City and St. Louis. Allegedly because of the influence of defendant air carriers, the local airport authority denied this request. Shortly thereafter, plaintiff sued the air carriers under the Sherman Act. Although the district court denied defendants' motion to dismiss, the court of appeals reversed, holding that the air carriers were entitled to *Noerr-Pennington* immunity.

If the decision not to reopen an airport to commercial traffic could be equated with a decision to set restrictive conditions on car rental concessions, the Court might be inclined to find *Mark Aero* controlling. However, the decisions are quite different. As the discussion to follow will indicate, the airport officials in Austin, Denver and Miami apparently made their decisions just as if their airports had been privately owned enterprises; the most significant government policy being implemented involved maximization of revenues. In *Mark Aero,* however, the airport officials considered a wide range of factors, including "the FAA Regional Director's desire to confine all scheduled air carrier operations to Kansas City International." 580 F.2d at 291. They were engaged in a policy-making function, or as the Eighth Circuit put it, they were addressing "a governmental policy question," involving as it did, consideration of "risks to the new airport, risks to airport financing, and a shift in airport activity." *Id.* at 292. Just because *Mark Aero* and the cases at bar involved

the decisionmaking of airport officials does not make them indistinguishable. To the contrary, the policy considerations influencing the decision in *Mark Aero* makes that case quite distinguishable from the actions before this Court.

The other cases relied upon by defendants are even less compelling. The first involved a local airport authority's decision to grant an exclusive taxicab franchise to a private company. *See Padgett v. Louisville and Jefferson County Air Board,* 492 F.2d 1258 (6 Cir. 1974). The second involved a local airport authority's decision to grant an exclusive right to conduct fixed base operations to private company. *See E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority;* 362 F.2d 52 (1 Cir. 1966), *cert. denied,* 385 U.S. 947, 87 S.Ct. 320, 17 L.Ed.2d 226 (1966). However, neither case involved application of the *Noerr-Pennington* doctrine; they were decided on *Parker v. Brown* grounds. Because these cases were decided before *City of Lafayette,* and because they contained no discussion of the policy aspects of the officials' decisions or of the specific mandate of the state legislature,[19] this Court does not find them to be controlling.[20] As a result, the Court's discussion must turn to the nature of the state mandate and decisionmaking process at each of the airports at issue in the litigation at bar.

2. *Austin*

The Robert Mueller Municipal Airport in Austin, Texas, is owned and operated by the City of Austin pursuant to the broad authority vested in it by the Municipal Airports Act, Tex.Civ.-Stat.Ann. arts. 46d—1 *et seq.* (Vernon 1969). That statute, which empowers Texas municipalities to "establish, * * * maintain, * * *

[19] In both cases, the courts rested their decisions on the broad legislative mandate to operate and manage the airports in question. 492 F.2d at 1260; 362 F.2d at 55.

[20] Moreover, even if these cases had been decided in light of *City of Lafayette,* their outcomes would not be controlling here. This Court's earlier discussion of the interrelation between *Parker* and *Noerr* should not be read as a holding that all attempts to influence government officials are immune under *Noerr* so long as the government action itself would be immune under *Parker.* That goes too far. The Court merely indicated that a private party must meet a heavy burden in claiming *Noerr* immunity when it is charged with having influenced government activity that would not itself be protected under the *Parker* doctrine; the converse is not necessarily true.

operate, regulate, protect, and police airports * * *," (art. 46d—2), also grants municipalities the power to

> "enter into contracts, leases and other arrangements for a term not exceeding forty (40) years [for the purpose of] granting the privilege of using * * * such airport * * * or space therein for commercial purposes [or for] supplying goods, commodities, things, services or facilities at such airport * * *." (art. 46d—4(a).)

The Municipal Airports Act also provides that

> "the municipality may establish the terms and conditions and fix the charges, rentals or fees for the privileges or services, which * * * shall be established with due regard to * * * the expenses of operation to the municipality." (art. 46d—4(a).)

Since April 22, 1976, Austin has exercised the authority vested in it through a Department of Aviation headed by an appointed Director of Aviation who reports to one of the assistant city managers. *See* Ordinance No. 760422—C, April 22, 1976; Deposition of Roy E. Bayless, at 9; Deposition of Col. Vance E. Murphy, at 7. Prior to that time, Austin had a Director of Aviation but no formal Department of Aviation.

There are four reasons why the Director of Aviation's decision to restrict the number of car rentals concessions at Austin cannot be found to be "governmental" for the purposes of this summary judgment motion. First, as with all the test airports, the decisionmaking body in Austin was a local municipal body acting in a non-legislative capacity. In that respect it was just one of many thousands of local governmental bodies functioning in the national economy. *See City of Lafayette, supra,* 435 U.S. at 407, 98 S.Ct. 1123. Attempts to influence such bodies are not entitled to as much protection as attempts to influence, for example, the state legislatures. *See supra,* at 1087, 1091—1092.

Second, not only did defendants seek to influence a local administrative body, but they sought to influence that body to make decisions that were not necessary to implement any state legislative policy. Although the city was authorized to operate the airport and to lease out commercial space within it, there is no indication that the legislature intended for the city to do so in a manner that would undercut federal antitrust policies.[21] To the

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[21] Of course, the Court is not requiring a precisely articulated state policy. Under

contrary, the Municipal Airports Act specifically states that

> "[n]o ordinance, resolution, rule, regulation or order adopted by a municipality pursuant to this Act shall be inconsistent with, or contrary to, any Act of the Congress of the United States or laws of this State, or to any regulations promulgated or standards established pursuant thereto, (art. 46d—7(b) (footnote deleted).)

Under a *City of Lafayette* analysis, then, the local airport authority would probably not be entitled to *Parker* state action immunity for its actions.

This latter conclusion is confirmed by a recent decision denying state action immunity to a Texas municipality that had granted an exclusive taxicab franchise with respect to the Dallas-Fort Worth Municipal Airport. *See Woolen v. Surtran Taxicabs, Inc.*, 461 F.Supp. 1025 (N.D.Tex.1978). In *Woolen* the district court based its *City of Lafayette* analysis on the section of the Municipal Airports Act quoted above, finding that

> "the Texas legislature did not contemplate the implementation of anticompetitive activities by municipalities in their operation of airports. While it is conceivable that [art. 46d—7(b)] was not intended to encompass the antitrust laws, its plain meaning cannot be ignored." *Id.* at 1031.

The court reached this result despite its recognition that the state legislature had characterized the operation and regulation of airports as a government function.[22]

The third reason why this Court finds that defendants cannot rely on *Noerr-Pennington* rests on its interpretation of art. 46d—4(b) of the Municipal Airports Act. That section empowers municipalities

> "by contract, lease or other arrangement * * * [to] grant to any qualified person for a term not to exceed forty (40) years the

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City of Lafayette it is enough that there be found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.' " 435 U.S. at 415, 98 S.Ct. at 1138.

[22] Art. 46d-15 provides that the

> "operation [and] regulation * * * of airports * * * and the exercise of any other powers herein granted to municipalities and other public agencies * * * are hereby declared to be public and governmental functions, exercised for a public purpose, and matters of public necessity * * *."

> privilege of operating, as agent of the municipality or otherwise, any airport owned or controlled by the municipality * * *."

In other words, the legislative delegation of the power to manage and operate municipal airports was sufficiently broad to permit operation of the airports by independent private corporations. If one of these corporations were now managing the Austin airport there would be little question but that it was engaged in commercial decisionmaking. Just because the city chose to subdelegate its powers to a quasi-governmental Director of Aviation rather than to a private corporation should not change the Court's perception of the nature of the decisions made.

The fourth reason why the Director of Aviation cannot be found to have engaged in governmental decisionmaking rests on the testimony of one of the directors. Col. Vance E. Murphy, who acted as Director of Aviation from September 1958 through 1973, testified that the Austin airport derived its revenues from its own operations and concessions, and that in running the airport, his decisions regarding allocation of car rental concessions were based on his exercise of "sound business judgment." Depositionof Murphy, at 4, 80—81, 85—86. In fact, as he wrote to the Austin City Council on May 27, 1965,

> "Determination of how many and which companies will be permitted to compete for an available market must be based upon a business judgment of what will produce the desired standards of service at rates calculated to attract the greatest public acceptance and volume of use, while at the same time showing a reasonable margin of profit for the operator and providing a fair revenue for the city to help off-set costs of airport operation." Exhibit 106.

This letter indicates that his decisions were guided more by economic criteria than by state-established policy considerations.

Perhaps even more telling is Col. Murphy's statement during his deposition that "he would maybe have said the same things and done it the same way if I had been running an airport that was owned by private enterprise * * *." When asked more specifically whether he would have done anything differently had the airport been owned by private enterprise, he responded, "No, I would not. Going back, of course, to the thing that I say, I did it for what I thought was the best interest of the city. I would have done that same thing for the best interest of any private enterprise that I was

working for." *Id.* at 87—88.

For these reasons the Court concludes that *Noerr-Pennington* does not immunize defendants' alleged attempts to influence the Austin Director of Aviation to restrict plaintiffs' entry onto the on-airport car rental market. The restrictive decision was made by a subordinate unit of government acting under broad rather than specific legislative authority, and it was made with all the indicia of commercial decisionmaking, apparently for the purpose of maximizing airport revenues. Although defendants have presented some evidence that supports their interpretation of the decisionmaking process, the Court cannot find that this evidence is sufficiently compelling to warrant the granting of the summary judgment motion as to Austin.

3. *Denver*

Stapleton International Airport in Denver, Colorado, is owned and operated by the City of Denver pursuant to authority granted to it by the "home rule" provision of the Colorado Constitution, Article XX. That provision authorizes the City and County of Denver, *inter alia*, "to, maintain, conduct, and operate * * * transportation systems * * * for the use of said city and county and the inhabitants thereof * * *."

The City and County of Denver has established a Department of Public Works, run by an appointed Manager of Public Works who has overall responsibility for the development and operation of the airport.
Charter of the City and County of Denver, Article II (Defendants' Denver Deposition, Exhibit 1). More specific authority has been delegated to a Director of Aviation whose duties include "negotiation of contracts with concessionaires." Deposition of Don W. Martin, at 68.

The Court concludes that with respect to Denver, as with Austin, the Directors' decisions regarding access to the on-airport car rental market were not sufficiently "governmental" to support a grant of *Noerr-Pennington* immunity to defendants. First, as in Austin, the decisionmaking authority was a low-level administrative unit of government. The same close degree of scrutiny must therefore be applied to defendants' attempts to assert their influence.

Second, applying the *City of Lafayette* analysis, it appears that

the Denver Director of Aviation was not carrying out a state mandate to pursue any anticompetitive activities. Although the state legislature did grant "home rule" cities the power to operate transportation systems, there is no indication that the state required, or even suggested, the manner in which the systems were to be operated. *See Woolen, supra,* at p. 1031.[23] A showing of general authority to operate in a particular area is not sufficient under *City of Lafayette* to establish state action.[24]

Third, the City and County of Denver itself evinced a desire that Stapleton Airport be managed in a manner that maximized potential revenues, *i.e.,* in a commercial manner. In enacting ordinances for the issuance of revenue bonds, for example, the City has required the airport to maximize revenues from leases and other concession agreements. *See* Exhibit E to Defendants' Motion for Summary Judgment. The 1960 Bond Ordinance provided in part:

> "[T]he City hereby covenants that it will continue in effect * * * a schedule of rentals, fees and charges for the use of the Airport as may be necessary or proper in order that the net revenues

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[23] To the extent that *Trans World Assoc. v. City and County of Denver,* 1974-2 Trade Cases ¶75,293 (D.Colo. Oct. 15, 1974), compels a different result, this Court declines to follow it. The Court in *Trans World Assoc.* relied on the *Parker* doctrine in holding that the Sherman Act did not reach an alleged conspiracy between the City and County of Denver and private car rental companies to fix car rental prices at Stapleton Airport. The finding of "valid governmental action" was based on Col.Rev.Stat. 5-4-1 (now 41-4-101), which declares that the "operation of airports [is a] public governmental function * * *." However, this Court has just concluded that a broad legislative statement that the general operations of a municipal facility constitute a government function is not dispositive. *See supra,* at ——. The threshold question under the *City of Lafayette* analysis must be whether the specific activity being challenged, *i.e.* car rental price fixing, was part of a state policy to substitute regulation or monopoly for competition. *City of Lafayette, supra,* 435 U.S. at 412-413, 98 S.Ct. 1123. *See Woolen, supra,* at p. 1031. Therefore, because this Court can find no Colorado legislative mandate with respect to the challenged governmental activity in the cases at bar, and because of the commercial nature of the government officials' decisionmaking process, the Court concludes that *Noerr-Pennington* immunity is not warranted for defendants, despite the suggestion in *Trans World Assoc.* to the contrary. *See id.* at p. 97,900.

[24] In that case, for example, the city had general authority to operate a public utility. What it lacked was the specific authority to engage in the anticompetitive operations that were being challenged.

derived therefrom in each fiscal year will be sufficient to make payments annually into the Bond Fund at least equal to one hundred twenty-five percent (125%) of the amounts required to be paid into said Fund * * *

* * * * * * *

"* * * That nothing herein contained shall be construed in such a manner as to prevent the City from leasing any part of the Airport * * * to private individuals, firms, or corporations if leasing will not substantially diminish the net revenues otherwise available for the payment of said bonds; * * * provided that the rents or rates established by any such leases or agreements will be set in such a manner as to provide the *reasonable optimum* net revenues under prevailing economic conditions, but in no event less than required by [¶1] above." (Emphasis added.)

Similar language may be found in the 1964 Bond Ordinance, No. 64, §§ 1001, 1112, and the 1969 Bond Ordinance, No. 100 §§ 1001, 1117. Moreover, § 1108 of the 1969 Bond Ordinance, No. 100, also provides that the City and County of Denver "will administer the Airport in accordance with sound business principles." Defendants' Exhibit 4 to Deposition of Harold Cook.

The Directors of Aviation recognized their fiscal obligations under these bond ordinances and made their decisions accordingly. *See, e. g.,* Michael Deposition at 67. Moreover, one of them not only testified that a major factor in his decisionmaking process was maximization of revenues, but he admitted that his decisions would have been just the same had Stapleton been owned by a private company rather than by the city. *See* Martin Deposition at 7, 8.[25]

For these reasons, the Court concludes that the local authority's decisions in Denver, as in Austin, were not of a sufficiently governmental policymaking nature as to warrant granting *Noerr–Pennington* immunity to defendants. Again, the decisions were made by a local governmental administrative body, not acting

[25] This statement is not inconsistent with testimony that the directors also based their decisions on concern for the quality of service to the public. *See e.g.,* Michael Deposition at 68, Martin Deposition at 69-70. A private business's long-range planning would require that its decisions be based on quality of service as well as on more immediate maximization of revenues. *Cf. Knutson v. Daily Review,* 468 F.Supp. 226, 239-240 (N.D.Cal.1979).

pursuant to a state legislative mandate, in a manner that reflected economic and commercial concerns rather than governmental policy considerations.

4. *Miami*

Miami International Airport in Miami, Florida, is owned and operated by Dade County, which is authorized "[t]o the extent not inconsistent with general or special law, [to p]rovide and operate air * * * terminals * * *." Fla.Stat. 125.01(1)(*l*). Because Dade is a "home rule" county, pursuant to Article VIII, section 6 of the Florida Constitution, it has the power "[t]o * * * maintain * * * and operate any [airport facility and franchise deemed necessary or convenient for the operation thereof]," and "[t]o make and enter into all contracts and agreements and to do and perform all acts and deeds necessary and incidental to the performance of its duties and the exercise of its powers." Fla. Stat. §§ 125.012(1), 125.012(8), 125.012(2). More specifically, it is authorized "[t]o fix, regulate, and collect rates and charges for the services and facilities furnished by [its airport]," *id.* at 125.012(9) "to fix and determine the rates * * * and other charges for the use of * * * airport facilities located within or without the county insofar as it may do so under the state constitution and the constitution and laws of the United States," *id.* at 125.012(10) and "[t]o grant exclusive or nonexclusive franchises to persons, firms, or corporations for the operating of * * * concessions of a nonaeronautical nature in, on and in connection with any [airport facility] owned and operated by the county." *Id.* at 125.012(17).

Dade County exercises this authority through its Director of Aviation. Although the ultimate responsibilty for operations at Miami International Airport rests with the Board of County Commissioners, the Director of Aviation is specifically responsible for "the formulation of concessions policy [and preparation] of specifications for submittal to the Board of County Commission-[ers] for approval." Deposition of Richard Judy, at 16.

The Court's decision with respect to Miami appears at first to be more difficult than it was with respect to either Austin or Denver. For although the decisionmaking body in Miami was a local governmental unit, and although the decisions of the airport officials appear to be more commercial than governmen-

tal, there is some problem with the *City of Lafayette* analysis. In Florida, the state legislature has conferred specific authority on home rule counties to grant franchises to private parties for the operation of airport concessions. *See Fla. Stat.* § *125.012(17).* Thus, under *City of Lafayette*, defendants' contention that the county was engaged in governmental activity is supported by what appears to be a legislative determination that the granting of exclusive franchises will further state policies. However, the Court must ultimately conclude that the Directors of Aviation's decisions were not sufficiently governmental for the purposes of *Noerr-Pennington.*

Although the Florida state legislature authorized Dade County to grant franchises for the operation of airport concessions, it also warned that in fixing rates and charges for the use of airport facilities Dade must not violate the constitution and laws of the United States. Fla.Stat. § 125.012(10). A significant part of plaintiffs' claim is that defendants influenced the airport officials to set unreasonable conditions and requirements for new concessionnaires' entry onto the on-airport car rental market. To the extent these entry requirements can be considered "rates * * * and * * * charges for the use of * * * airport facilities," the Court can conclude that the Florida legislature, in granting home rules counties the right to allocate airport concessions, did not grant them the right to do so in a manner that would violate the antitrust laws.

The non-governmental nature of the airport officials' decisions is also suggested by a Florida state court case, *Miami Beach Airline Service v. Crandon,* 159 Fla. 504, 32 So.2d 153 (1947). In *Miami Beach,* a taxicab company brought suit against the county for having granted a competitor an exclusive franchise at Miami International Airport. The basis of the suit was that the county had no legal power to create a monopoly that would hamper it in its governmental capacity. In ruling in favor of the county, the Florida Supreme Court concluded that the franchise agreement was valid because Dade County was engaged in an activity that was "essentially proprietary and in no respect governmental." *Id.* at 155. This decision has recently been cited with approval by a lower Florida state court. *See Smith v. Canaveral Port Authority,* 345 So.2d 357, 357 (Fla.App.1977).

A more significant decision influencing this Court's analysis is

the *Chestnut Fleet Rentals* case. As noted earlier the court in *Chestnut Fleet Rentals* initially held that the decision of Dade County's Director of Aviation to restrict the on-airport car rental market at Miami International Airport was "of a commercial nature, not of a governmental nature." *See supra,* at 1082. Although the Court cannot grant this initial denial of summary judgment collateral estoppel effect, it does note that the Eastern District of Pennsylvania's decision was reached after consideration of the arguments raised by the Hertz Corporation, Avis Rent-A-Car System, Inc., and National Car Rental System, Inc., all of which are defendants in the Miami litigation before this Court.

The final reason for this Court's denial of defendants' summary judgment motion with respect to Miami is the most important. Not only were the concession allocation decisions made by a local governmental unit, but they were made in a non-policymaking, non-governmental manner. Dade's Director of Aviation testified in deposition that in his operation of Miami International Airport he was performing an enterprise, or proprietary function. Judy Deposition at 314—315. Moreover, he admitted that the basis for granting defendants their long-term exclusive concessions was

> "financial. They agreed to this huge guarantee of revenue, and in turn we said that, 'We would give you an exclusive franchise for that period.' " *Id.* at 35—36.

Also, he indicated that, with some qualifications, his decisions regarding allocation of car rental concessions would have been the same had the airport been owned and operated by a private company rather than by the county. *Id.* at 70, 73—74, 159—160.

Although Mr. Judy stressed that he had an obligation to serve the public in addition to an obligation to maximize revenues, this Court cannot grant defendants' motion for summary judgment on grounds of "governmental activity." *See id.* at 18. The car rental decisions were made by a local governmental unit. There is a strong argument that the municipality would not be protected from the antitrust laws by the state action exemption as developed by *City of Lafayette.* The considerations influencing the airport officials' decisions were for the most part those that any good businessperson would consider. For these reasons, defendants' motion with respect to Miami must be denied as well.

II. *CAUSATION*

The second basis for defendants' first summary judgment motion is causation. They contend that their conduct was neither a cause in fact nor a proximate cause of plaintiffs' injury. With respect to cause in fact, defendants' main argument is that the decisions of the airport officials were an intervening, superseding factor that broke the chain of causation. Alternatively, defendants suggest that plaintiff Budget was injured only as a result of its failure to seek an on-airport car rental concession in Denver and Miami, and that their conduct could not therefore be the cause in fact of any harm that Budget suffered.[26] With respect to proximate cause, defendants contend that as a matter of law that an attempt to influence a government official cannot be the cause of harm suffered by a private party as the result of some official action. Because the Court finds genuine issues of material fact exist, however, and because it disagrees with defendants' proximate cause argument, it must deny this motion as well.

The starting point for the Court's discussion of causation is section 4 of the Clayton Act, 15 U.S.C. § 15. That section permits "[a]ny person who shall be injured in his business or property *by reason of* anything forbidden in the antitrust laws * * *" (emphasis added) to bring a private treble damage action in federal district court. The underlined language has been interpreted as requiring plaintiffs to prove a causal connection between their alleged injury and defendants' wrongful acts.[27] *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969); *Commerce Tankers Corp. v. Nat'l Maritime U. of Amer.*, 553 F.2d 793, 800—801 (2 Cir.), *cert. denied*, 434 U.S. 923, 98 S.Ct. 400, 543 L.Ed.2d 280 (1977).

Courts have not required plaintiffs to prove that defendants'

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[26] Because Budget's lawsuit was settled and dismissed on February 8, 1979, this alternative argument need not be addressed. However, because Miami International Airport is served by a Budget licensee, the Court will consider defendants' Miami contentions on the ground that defendants' argument might be directed against the licensee.

[27] This requirement is closely linked to the concept of "standing" to sue. *See infra* at 1104; *see also Mulvey v. Samuel Goldwyn Productions*, 433 F.2d 1073, 1076 (9 Cir. 1970), *cert. denied*, 402 U.S. 923, 91 S.Ct. 1377, 28 L.Ed.2d 662 (1971); D. Berger and R. Bernstein, An Analytical Framework for Antitrust Standing, 86 Yale L.J. 809, 810-811 (1977).

acts were the *sole* cause of injury. Rather, in keeping with general tort law, they have determined that the causation requirement may be met by proof that defendants' violation was either a "material cause" of plaintiffs' injury or that it was a "substitutional cause," notwithstanding that other factors also contributed. *See, e. g., Zenith Radio Corp, supra,* 395 U.S. at 114 n.9, 89 S.Ct. 1562 (material); *PermaLife Mufflers, Inc. v. Int'l Parts Corp.,* 392 U.S. 134, 143—144, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968) (White, J., concurring) (both); *Continental Ore Co., supra,* 370 U.S. at 702, 82 S.Ct. 1404 (material); *Commerce Tankers Corp., supra,* 553 F.2d at 800—801 (both); *Haverhill Gazette Co. v. Union Leader Corp.,* 333 F.2d 798, 806 (1 Cir.), *cert. denied,* 379 U.S. 931, 85 S.Ct. 329, 13 L.Ed.2d 343 (1974) (substantial); *E. V. Prentice Machinery Co. v. Associated Plywood Mills, Inc.,* 252 F.2d 473, 479 (9 Cir.), *cert denied,* 356 U.S. 951, 78 S.Ct. 917, 2 L.Ed.2d 844 (1958) (substantial); Restatement (Second) of Torts, § 431 (1965) (substantial). Moreover, they have only required plaintiffs to establish "with reasonable probability" the existence of some causal connection between defendants' wrongful acts and some loss of anticipated revenue. *See E. V. Prentice Machinery Co., supra* 252 F.2d at 477; *Flintkote Co. v. Lysfjord,* 246 F.2d 368, 392 (9 Cir.), *cert. denied,* 355 U.S. 835, 78 S.Ct. 54, 2 L.Ed.2d 46 (1957).

Causation is a question of fact. *See Pacific Coast Agr. Export Ass'n v. Sunkist Growers, Inc.,* 526 F.2d 1196, 1205—1206 (9 Cir. 1975), *cert. denied,* 425 U.S. 959, 96 S.Ct. 1741, 48 L.Ed.2d 204 (1976); *Terrell v. Household Goods Carriers' Bureau,* 494 F.2d 16, 20 (5 Cir. 1974). For that reason, the courts have hesitated in granting summary judgment against plaintiffs on the causation issue, particularly in antitrust cases. *See, e. g., Weiman Co. v. Kroehler Mfg. Co.,* 428 F.2d 726, 729 (7 Cir. 1970). It is only when plaintiffs have "failed to develop a theory or to set out any facts in the depositions and other documents that have been filed which would show a causal link * * *," *Sound Ship Bldg. Corp. V. Bethlehem Steel Co.,* 533 F.2d 96, 98 (3 Cir.) *cert. denied,* 429 U.S. 860, 97 S.Ct. 161, 50 L.Ed.2d 137 (1976), or when "undisputed facts" establish that there could be no causal connection as a matter of law, *see, e. g., Lee-Moore Oil Co. v. Union Oil Co.,* 441 F.Supp. 730 (M.D.N.C.1977), that courts have been willing to grant summary judgment on causation in

favor of defendants.

Defendants' first causation argument is based on the absence of cause in fact. Contending that the airport officials acted independently in deciding to restrict entry onto the on-airport car rental market, and that their own suggestions and advice were not a factor in the decisionmaking process, defendants contend that the decisions of the airport officials were an intervening, superseding factor that broke the chain of causation. While the Court might agree with this argument if it were undisputed that the airport officials made their decisions without regard to outside influence, it finds that plaintiffs have introduced sufficient evidence of defendants' influence to create a triable issue of fact.

In Austin, for example, although the airport director, Col. Murphy, testified in deposition that he reached his decisions without regard to outside influence, *see* Murphy Deposition at 18—19, 135—136,[28] there is evidence before the Court that might lead a jury to conclude otherwise. For example, Col. Murphy also testified that representatives of the "Big Three" met privately with him to express their position that Austin should not add a fourth car rental concession. *See id.* at 90—91. In addition, the record contains lengthy memoranda from Hertz, Avis, and National, all sent within a four-day period, outlining their opposition to the addition of a fourth concessionaire. Exhibits 111, 112, 113. Moreover, Col. Murphy's May 27, 1965 recommendation that Austin restrict its car rental concessions to the present three (Exhibit 106) was written only two days after a Hertz representative had called him and had sent a "copy of material which we have successfully used on other occasions to limit the number of concessionaires in Airports in various sections of the country." Exhibit 114. *See also* Murphy Deposition at 50—51.[29] Finally, the record contains a memorandum written by a field operations manager for National that stated:

> "As soon as news first broke on Budget trying to get in at San Antonio, I contacted Austin. Budget is owned and operated by the same licensee out of San Antonio. *Hertz, Avis and*

[28] Col. Murphy's successor, Roy E. Bayless, has testified similarly. *See* Bayless Deposition at 27, 33, 44.

[29] In addition, Col. Murphy admitted using some of the reasons underlying Hertz' position in his presentation to the City Council. *See, e.g.*, Murphy Deposition at 119, 122, 127.

National met with the airport manager and worked out an agreement. The airport manager does not want a fourth operator on airport. We will get a copy of the new contract to the legal department as soon as we receive it." Exhibit 56 (emphasis added).

It may well be that the Austin Director of Aviation was not influenced by defendants in his decisions regarding allocation of car rental concessions. However, in light of the evidence just discussed, the Court must leave resolution of that question to the jury. Plaintiffs have submitted sufficient evidence to create a dispute as to whether defendants' conduct was a cause in fact of their injury in Austin.[30]

The Directors of Aviation in Denver also testified that their decisions regarding car rental concessions were their own. *See* Martin Deposition at 76—79; Michael Deposition at 85—86. But again plaintiffs have introduced evidence from which a jury could find to the contrary. For example, the record contains letters from Hertz and National objecting to the proposed addition of another car rental concession at Stapleton Airport. Exhibits 119, 120; *see also* Michael Deposition at 18. In addition, it contains a letter from Hertz to the Director of Aviation in which Hertz offered to assist in the drafting of bid specifications for the airport. Exhibit 121. Moreover, it contains three letters, dated July 1965, February 1966, and March 1966, in which Hertz proposed specific language it wished to have inserted in the pending car rental concession agreements. Exhibits 122, 123, 124. Included in these proposals were provisions that a minimum guarantee of the greater of $125,000 or 10% of gross revenues be established, and that the city not grant any additional car rental concession unless the new concessionaire agreed to meet that minimum. These provisions were incorporated into the final concession agreements. *See* Exhibits 125 §36, 126 §36, 127 §35. Finally, on July 28, 1972, Mr. Michael, the Director of Aviation,

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[30] Defendants have also argued that plaintiffs would have been denied access to Austin regardless of their influence, because there was no space available for a fourth concession. Although Col. Murphy stated on a number of occasions that he would not recommend the award of a fourth concession because of lack of space, *see e.g.*, Murphy Deposition at 15, 38, 48, 56, 58, 100-101, 116, plaintiffs have introduced rebuttal evidence indicating that there was space available. *See e.g.*, Exhibit 118; Underwood Deposition at 39, 46.

wrote the five existing concessionaires to set up a meeting in which they could discuss minimum guarantees and space allocation. In this letter he wrote: "We are receiving considerable pressure from off Airport operators to get on the Airport. The best justification we have to deal with this is the minimum guarantees we receive from on Airport operators."

Again, these "rebuttal" facts are more than sufficient to create a triable issue of fact over whether the airport directors in Denver acted wholly independently of defendants' influence. The jury should be given an opportunity to decide the question of defendants' influence for itself.

In Miami, although the Director of Aviation testified, "I run this airport, and I made the decisions for it. * * * I'm not owned by anyone," Judy Deposition at 256, 244, 251, plaintiffs have again produced evidence from which the jury could find to the contrary. The most telling example is evidence that in 1964, after Olins Rent A Car withdrew as a concessionaire at Miami, Hertz, Avis and National met with representatives of the Port Authority and proposed an increase in their minimum guarantees in exchange for a ten-year extension of the concessions and an agreement that during this period no more than three car rental concessions would be permitted at the airport. Exhibits 136, 137, 138. These proposals were accepted by the airport officials. Exhibit 139; *see also* Key Deposition at 253.

A motion for summary judgment may not be granted where there is a genuine issue of material fact. *See* Fed.R.Civ.Pro.56(c). The evidence presented by plaintiffs certainly creates a genuine issue as to whether defendants' influence over the airport officials' decisions was a "material" or a "substantial" cause of plaintiffs' injury. *See* cases cited *supra*, at 1099. The cause in fact argument directed by defendants against all the plaintiffs must therefore be rejected.

Defendants' second cause in fact argument is directed at plaintiff Budget. *See supra* at 1099 n.26. They contend that Budget did not seek entry onto the Miami airport until 1974, at which point its bid was rejected as being too low. Defendants contend that this failure was the true cause in fact of Budget's injury. Again, however, the Court disagrees that it can grant summary judgment based on this assertion.

The Court agrees with defendants' general proposition that a

plaintiff may not claim damages under the antitrust laws for injury resulting from its own inaction. *See, e. g., Zenith Radio Corp., supra,* 395 U.S. at 126—127, 128, 89 S.Ct. at 1578 ("If Zenith's failure to enter the English market was attributable to its lack of desire, its limited production capabilities, or to other factors independent of [defendant's] unlawful conduct, Zenith would not have met its [causation] burden under § 4"); *Cleary v. Nat'l Distillers and Chemical Corp.,* 505 F.2d 695, 697 (9 Cir. 1974) ("A demand and refusal is a prerequisite to a claim of concerted refusal to deal"); *Dahl, Inc. v. Roy Cooper Co.,* 448 F.2d 17, 19 (9 Cir. 1971). However, the underlying factual basis for this proposition is disputed.

Plaintiffs have introduced the affidavit of Leonard Solomon, currently the President of Diversified Services, Inc., a company that "engages in the car rental business as Budget Rent A Car of Miami." Solomon stated that he has "been engaged in the car rental business in [Miami] since 1962" and that

> "It has been my position since 1962 that Budget Rent A Car of Miami should be located on the Miami International Airport and I have consistently made efforts, since 1962, to obtain an on-airport concession. Periodically, during the period from approximately 1963 through to 1974, I called or directed my manager to call the Miami International Airport to determine the status of the concession agreements. We were always advised that they were exclusive contracts but that when they expired we would have an opportunity to submit bids." Solomon Affidavit at ¶4.

This affidavit is sufficient to call into question defendants' factual contention that Budget failed to seek entry onto the Miami airport during the time period for which these actions were brought.

Even if plaintiffs had not submitted this affidavit, defendants' summary judgment motion would still be denied. Assuming *arguendo* that Budget failed to seek entry onto the Miami airport, there would still exist a disputed issue as to whether its failure could be excused on the grounds of "futility." Although a party may not recover for its exclusion from a market if it failed to seek entry, this failure will be excused if an attempt to obtain entry would have been futile. *See Zenith Radio Corp., supra,* 395 U.S. at 120 n.15, 89 S.Ct. 1562; *Continental Ore Co., supra,* 370

U.S. at 699—702, 82 S.Ct. 1404. In light of the long-term exclusive agreements reached between the Miami airport authority and defendants, a jury could reasonably conclude that further attempts by Budget to seek entry onto the Miami airport would have been futile. Miami's own Director of Aviation testified that he assumed Budget could not legally have been awarded an airport concession between 1958 and 1974. Judy Deposition at 122.

The Court also finds a triable issue of fact with respect to defendants' argument that the sole cause of Budget's failure to obtain a concession in Miami in 1974 was its low bid. Budget concedes that it failed to outbid Dollar in 1974. However, it has submitted an affidavit stating that it could not responsibly have bid higher because the bid specifications were drafted so as to place a successful fourth bidder "at a severe competitive disadvantage." Solomon Affidavit at 4, ¶5. Again, a jury might infer from this that defendants' influence over the airport officials was a cause in fact of Budget's exclusion. Defendants' cause in fact arguments must therefore be denied due to the existence of genuine issues of material fact.

Defendants' second main argument is that even if they were a cause in fact of plaintiffs' injury, they could not have been a proximate, or legal, cause. They rely on both *Noerr* and *Pennington* for the proposition that a private defendant cannot be the proximate cause of a plaintiff's injury if its only conduct was to influence government officials to take action that caused plaintiff some harm. The Court finds this argument to be without merit.

The cases relied upon by the Court in establishing the "commercial activity" exception suffice to rebut defendants' argument. In *Whitten, Sacramento Coca-Cola, Hecht,* and *General Aircraft Corp.*, the courts all indicated that a private defendant may be subject to antitrust liability for successfully influencing public officials to make a decision that caused harm to plaintiff. *See also Commerce Tankers Corp., supra,* 553 F.2d at 801 (court's granting of injunction urged by defendants is not a superseding cause). Although none of these cases addressed the issue of proximate cause specifically, their entire foundation would be shaken if defendants' argument were accepted. If an attempt to influence a government official could never be the

proximate cause of a private plaintiff's resulting injury, there could never be a commercial activity exception; the courts would deny plaintiffs' claim before getting to that issue. Moreover, despite defendants' reliance on *Noerr* and *Pennington*, [31] the Court is not persuaded that the Supreme Court would have developed a First Amendment exemption from the antitrust laws in those cases if it could have avoided the constitutional issue by basing its decisions on the absence of proximate cause. Defendants' second argument must therefore be rejected as well.

In conclusion, the Court finds that defendants' summary judgment motion based on causation must be denied. There is a genuine issue of fact as to whether defendants' alleged attempts to influence government officials were a cause in fact of plaintiffs' injury. Moreover, the Court cannot conclude as a matter of law that defendants were not the proximate cause of plaintiffs' injury as well.

III. *STANDING*

The sole basis for defendants' second summary judgment motion is standing. They allege that Dollar lacks standing to sue for injuries resulting from the exclusion of its licensees from certain airports.[32] Noting that Dollar never sought entry onto

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[31] Regarding *Pennington*, for example, defendants rely on the Supreme Court's statement that "[i]t is clear under *Noerr* that [plaintiff] could not collect any damages under the Sherman Act for any injury which it suffered from the action of the Secretary of Labor." 381 U.S. at 671, 85 S.Ct. at 1594. However, this statement does not impose a proximate cause limitation on the effect of a private defendant's conduct. Rather, it is clear from the next sentence of the opinion that this statement merely reflects the Court's earlier conclusions that

> "[t]he conduct of the union and the operators did not violate the Act, the action taken to set a minimum wage for government purchases of coal was the act of a public official who is not claimed to be a co-conspirator, and the jury should have been instructed, as UMW requested, to exclude any damages which Phillips may have suffered as a result of the Secretary's Walsh-Healey determinations." *Ibid* (footnote omitted).

[32] This motion was initially brought "against plaintiffs Budget Rent-A-Car Corporation, Budget Rent-A-Car System, Inc., and Dollar Rent-A-Car System, Inc., plaintiffs in actions C-75-2560-CBR and C-77-0876-CBR, respectively, with respect to their claims based on alleged injuries to their franchisees." However, during the briefing period the Budget action was settled and Budget's claims were accordingly dismissed. As a result, defendants declare that their "Joint Motion remains directed only at Dollar, and at such Budget licensee

those airports directly, defendants contend that any injury suffered by Dollar is too remote or incidental to serve as a basis for standing. Defendants therefore raise the issue of whether, or in what circumstances, a licensor may sue for antitrust damages resulting from the exclusion of one or more of its licensees from a particular market.

Again, the starting point for the Court's discussion is section 4 of the Clayton Act, 15 U.S.C. § 15,[33] particularly the words, "* * * injured * * * by reason of anything forbidden in the antitrust laws * * *." Courts have not interpreted these words literally. Rather, they have placed a restrictive gloss on them in order to limit the range of potential antitrust plaintiffs. *See Solinger v. A & M Records, Inc.*, 586 F.2d 1304, 1308 (9 Cir. 1978), *cert. denied*, —U.S.—, 99 S.Ct. 1999, 60 L.Ed.2d 377 (1979); *John Lenore & Co. v. Olympia Brewing Co.*, 550 F.2d 495, 499 (9 Cir. 1977). More specifically, courts have required either that a plaintiff suffer some "direct injury" or that plaintiff be within the "target area" of the defendants' violation.

The differences between these two approaches were explained in *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122 (9 Cir.), *cert. denied*, 414 U.S. 1045, 94 S.Ct. 531, 38 L.Ed.2d 336 (1973):

> "Courts adhering to the 'direct injury' test focus principally on the relationship between the alleged antitrust violator and the claimant. Generally, if the claimant is separated from the violator by an intermediate antitrust victim, standing is denied by attaching conclusory labels such as 'remote', 'indirect', and

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plaintiffs as may act in the capacity of sublicensors."

The Court intends to limit the motion even further. No arguments or facts have been presented with respect to the Budget "sublicensors." The Court is therefore unable to evaluate the nature of their licensing agreements with their sub-licensees or their relationship to the on-airport car rental market. Thus, in ruling upon defendants' motion, the Court will consider only the issue of plaintiff Dollar's standing.

[33] This statute provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

'consequential". * * *

"In contrast, courts employing the 'target area' approach focus on claimant's relationship to the area of the economy allegedly injured by the defendant.

> "[T]o state a cause of action under the anti-trust laws a plaintiff must show more than that one purpose of the conspiracy was a restraint of trade and that an act has been committed which harms him. He must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. Otherwise he is not injured "by reason" of anything forbidden in the anti-trust laws.'

Conference of Studio Unions v. Loew's Inc., 193 F.2d 51, 54—55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919, 72 S.Ct. 367, 96 L.Ed. 687 (1952). To attain standing [under the "target area" approach], a plaintiff must thus allege that the antitrust violation injured a commercial enterprise of the plaintiff in the area of the ecomony in which the elimination of competition occurred. Standing is denied, on the other hand, if the claimant's commercial activity occurred outside that area of the economy." 481 F.2d at 127—128.

In evaluating challenges to antitrust plaintiffs' standing, the Court of Appeals for the Ninth Circuit has chosen to follow the "target area" approach, which "provides a logical and flexible tool for analyzing whether a particular claimant falls within the class of persons slated by Congress for protection under section 4 of the Clayton Act," rather than the "direct injury" approach, which often results in a denial of standing "to any plaintiff who happens to fall within certain talismanic rubrics [such as] 'creditor', 'landlord', 'lessor', 'franchisor', [and] 'supplier.'" *Id.* at 128, 127 & n.7; *accord, Solinger, supra*, 586 F.2d at 1310; *Bosse v. Crowell, Collier & Macmillan*, 565 F.2d 602, 606 (9 Cir. 1977); *John Lenore & Co., supra*, 550 F.2d at 499; *Blankenship v. Hearst Corp.*, 519 F.2d 418, 425—426 (9 Cir. 1975). Accordingly, in analyzing defendants' arguments the Court will use the "target area" approach. First, it will identify the area of the economy that was the target of defendants' allegedly anticompetitive conduct.[34]

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[34] In identifying the target area, or the "area of the economy which is endangered by a breakdown of competitive conditions in a particular industry," *Conference*

Then, it will determine whether plaintiff's alleged injury occurred within that target area. *See Blankenship, supra,* 519 F.2d at 426.

The Court finds the issue of Dollar's standing to be controlled by the opinion in *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358 (9 Cir. 1955). Plaintiff in *Karseal* was a manufacturer of car wax. In order to reach the retail market, plaintiff sold its wax to franchised distributors who in turn sold it to independent service stations. Among the potential customers for plaintiff's car wax were the service stations that sold defendant's gasoline. However, plaintiff alleged that this market was foreclosed to its franchisees by the exclusive dealing contracts entered into by defendant and its service stations. Plaintiff brought suit under Section 1 of the Sherman Act and Section 3 of the Clayton Act seeking recovery of the lost profits it would have made had its franchisees been permitted to sell to defendant's service stations.

The Court of Appeals' opinion focused on the issue of plaintiff's standing. Applying the "target area" approach, it asked

> "whether Karseal's business and wax product is 'within that area of the economy which is endangered by a break-down of competitive conditions in a particular industry.'* * * Assuming Karseal was 'hit' by the effect of the Richfield antitrust violations, was Karseal 'aimed at' with enough precision to entitle it to maintain a treble damage suit under the Clayton Act?" 221 F.2d at 362 (citation omitted).

The court concluded that plaintiff could proceed with its suit even though defendant's illegal restraint had its most immediate impact on the retail level and even though plaintiff was not a direct supplier of car wax at that level.[35] It reached this result by finding that the area of the economy affected was the car wax market as a whole, and that plaintiff's injury occurred within that

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of Studio Unions v. Loew's, 193 F.2d 51, 54-55 (9 Cir. 1951), *cert. denied*, 342 U.S. 919, 72 S.Ct. 367, 96 L.Ed. 687 (1952), the court can consider the area that "could reasonably be foreseen would be affected" by defendants' conduct. *See Blankenship, supra*, 512 F.2d at 426, *quoting Mulvey v. Samuel Goldwyn Productions, supra*, 433 F.2d at 1076; *Twentieth Century-Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 220 (9 Cir.), *cert. denied*, 376 U.S. 880, 85 S.Ct. 143, 13 L.Ed.2d 87 (1964).

[35] Although plaintiff's franchisees had not sought to intervene, it seems clear that they too would have had standing to bring suit against defendant. 221 F.2d at 364.

market.[36]

Similarly, this Court finds that although the car rental defendants' allegedly anticompetitive conduct had an immediate impact on the on-airport car rental market, their activities were directed against competing car rental companies and the entire business of supplying rental cars at airports. By seeking the exclusion of Dollar's licensees, logo, and rental system from the on-airport market, and by seeking to eliminate a considerable source of income from Dollar with respect to those airports at which its licensees had sought entry, defendants "aimed at" Dollar just as surely as defendant in *Karseal* aimed at its competing supplier of car wax. Plaintiff's allegations of a nationwide conspiracy strongly reinforce this conclusion.

Moreover, just as the plaintiff manufacturer in *Karseal* was deeply involved in the car wax market, so too was plaintiff Dollar deeply involved in the on-airport car rental market. Although Dollar did not itself provide the automobiles or perform the rental transactions in the challenged markets, it did offer its licensees advice and expertise in their performance of these functions. The standard License Agreement indicated that Dollar would inform and advise its licensees with regard to "methods of operation and accounting, advertising and publicity service, insurance programs, and the style and character of equipment, furnishings and appliances for conducting a Vehicle Renting Business." Dollar also provided "signs, decalcomanias, standard rental agreements, letterheads, envelopes, invoices, statements, rate folders, operating and accounting forms, promotional materials and other similar materials" to its licensees. Further, Dollar's Vice President, Gary Paxton, testified in deposition that Dollar assisted its licensees in negotiating airport contracts and in formulating bids for airport concessions. Paxton Deposition at 81. In addition, Paxton indicated that Dollar stood ready to assume a front-line position if one of its licensees failed in its contractual obligation to "make every reasonable effort" to obtain entry onto airports within its

[36] The court stated that defendant's

"illegal acts were directed against the manufacturers and distributors of the competing products, including Karseal's wax. Such persons and such products were the 'target' of the illegal practices." *Id.* at 364 (emphasis added).

territory.[37] Finally, Dollar's involvement in the on-airport car rental market is shown by its willingness to co-sign airport concession agreements with its licensees in the capacity of guarantor and, in some instances, to execute concession agreements on behalf of its licensees. Caruso Deposition at 64—65.

The Court's conclusion might differ if Dollar's only involvement with its licensees had been as a supplier of automobiles, of rental transaction forms, or of some other product. In such a case, although plaintiff would surely be injured by defendants' conduct, the Court might find its connection with the car rental busines to be too tenuous to warrant a finding that plaintiff has standing. But in the situation presented, where Dollar is intimately involved in the on-airport car rental market, where it offers its licensees advertising, promotional aids and assistance at many levels and stages of the business, and where it is a direct competitor of defendants in many car rental markets, the Court must conclude that Dollar has standing to sue for the damages it may have suffered.[36] To quote *Karseal* with some modifications.

> "To say to a manufacturer of wax [or a renter of cars] that he may have the protection of the antitrust laws in private litigation if he hires salesmen [or car rental agents] for his product, and not have such protection if he decides to contract with a distributor [or licensee], would appear to be an unequal application of the law and [an] unjustified dictation as to how he [should] operate * * * his business." 221 F.2d at 364—365.

Defendants seek to avoid this result by citing two cases that denied standing to franchisors damaged by conduct that was more directly felt by their franchisees. However, these cases are distinguishable, both on their facts and on the legal standards

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37. Paxton testified that

> "if [the licensee] does not make that effort, then [Dollar has] the right to make that effort and operate that terminal [itself] or give that terminal to a different licensee [although the initial licensee] would still retain his area minus the terminal." Paxton Deposition at 38.

[38] The Court also notes that, as in *Karseal*, the extent of plaintiff's injury can be readily calculated once the amount of its licensees' lost sales is determined. Plaintiff's standard license agreement provides in Section 11, ¶2.19, that each licensee shall pay 8% of its total gross monthly receipts in consideration of the benefits it receives from Dollar. Thus, there is no greater difficulty in assessing Dollar's damages as licensor than there would have been had it sought to service the airports directly.

applied.

In *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183 (2 Cir. 1970), *cert. denied*, 401 U.S. 923, 91 S.Ct. 877, 27 L.Ed.2s 826 (1971), plaintiff was a franchisor of companies that produced and bottled its "Billy Baxter" line of soft drinks. Defendants were two soft drink manufacturers. Alleging that defendants had induced its franchisees' retail customers not to purchase "Billy Baxter" soft drinks, plaintiff brought suit to recover the royalties it would have earned from its franchisees had their sales not been adversely affected by defendants' conduct.

The Court of Appeals for the Second Circuit, over a vigorous dissent, found that plaintiff lacked standing. In contrast to *Karseal*, the court concluded that the "target area" of defendants' conduct was not plaintiffs' product; rather, it was merely the retail market for that product. In denying standing, the court noted that plaintiff

> "was not only one step removed from the link in the production-distribution chain receiving the first impact of the alleged misconduct, but also it [lacked] * * * comprehensive responsibilities for and identification with the beverages. * * * [It] merely licensed the information needed for the manufacture of the beverages, supplied ingredients which still others had manufactured, and left further production activities to its franchisees." *Id.* at 188 (footnote omitted).

Not only did plaintiff not compete in the retail market, but aside from a secret beverage extract that it purchased from an outside source, it neither " 'manufactured, bottled, distributed nor sold [any] products' * * * to its franchisees." *Id.* at 185.

Billy Baxter is not controlling here. First, it arose in a circuit that applies a more restrictive test for standing than the Ninth Circuit applies. *See In re Multidistrict Vehicle Air Pollution, supra*, 481 F.2d at 127 n.7 (Second Circuit applies its "own particular mixture * * * of the two tests [that] more closely resembles the 'direct injury' test"); *see also Long Island Lighting Co. v. Standard Oil Co. of Calif.*, 521 F.2d 1269, 1274 (2 Cir. 1975), *cert. denied*, 423 U.S. 1073, 96 S.Ct. 855, 47 L.Ed.2d 83 (1976). Second, it involved a plaintiff who was neither a competitor of defendants nor deeply involved in the affected market. As was noted in a later case arising in the same circuit, Billy Baxter, Inc., had only a "circumstantial role" in the

manufacture and distribution of tis product. *Sulmeyer v. Seven-Up Corp.*, 411 F.Supp. 635, 638 n.4 (S.D.N.Y.1976).[39] Dollar's role in the car rental business was significantly greater.

The second case cited by defendants, *Nationwide Auto Appraiser Serv. v. Assoc. of C & S Co.*, 382 F.2d 925 (10 Cir. 1967), is even less persuasive than *Billy Baxter*. It has been referred to by the Court of Appeals for the Ninth Circuit as an example of the "regrettable tendency [among adherents of the "direct injury" approach] to deny standing to any plaintiff who happens to fall within certain talismanic rubrics." *In re Multidistrict Vehicle Air Pollution, supra,* 481 F.2d at 127 & n.8. Moreover, the deciding court explicitly stated that it was applying a test for standing that was stricter than the Ninth Circuit's test. 382 F.2d at 928—929.

Even if *Nationwide Auto Appraisers* had been analyzed under the "target area" approach, it would be distinguishable. Plaintiff Nationwide was a franchisor of automobile damage appraisers. Defendants were various associations of insurance companies that were alleged to have "influenced their members to 'sponsor' a single appraiser in a particular locality," thereby excluding plaintiff's franchisees" from a substantial segment of the damage appraisal business." 382 F.2d at 926. However, neither plaintiff nor defendants were in the automobile damage appraisal business themselves.

The most significant difference between *Nationwide Auto Appraisers* and the car rental cases involves the parties' relationship to the affected market. As noted, the *Nationwide* defendants did not compete with plaintiff in the damage appraisal business,

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[39] For many reasons, the car rental cases are more similar to *Sulmeyer* than to *Billy Baxter*. *Sulmeyer* also involved a company, Bubble Up, that sold soft drink extracts to its franchised bottlers. However,

> "unlike the plaintiff in *Billy Baxter*, Bubble Up has asserted that it, like defendants, manufactured concentrates, franchised bottlers, supplied advertising and promotional material, offered substantial assistance to its franchisees, and was actively involved in supervising the work of the franchisees. Plaintiffs allege that Bubble Up was directly in competition with defendants, that defendants have directly sought to limit not only Bubble Up's franchises, but also Bubble Up itself, and to that end, defendants have instituted litigation in foreign countries and coerced bottlers who were potential franchisees of plaintiffs." *Id.* at 638 (footnote omitted).

or for that matter, in any other business. See *id.* at 928 (distinguishing *Karseal* as involving competitive products of plaintiff and defendant). By contrast, Dollar and defendants in the cases at bar are competitors. Moreover, they compete in their primary line of business, car rentals. This is a sufficient basis for distinguishing *Nationwide Auto Appraisers.*

Having concluded that plaintiff Dollar meets the "target area" test, and that the cases cited by defendants are inapposite, the Court is left with only one more argument to consider. Defendants have suggested that the "rationale" of *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), militates against a finding that Dollar has standing. The Court does not agree.

Stated briefly, the Supreme Court held in *Illinois Brick* that an indirect purchaser may not sue an antitrust violator for price fixing under section 4 of the Clayton Act. In reaffirming and extending *Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968), the Court determined that a "passing-on" theory could not be used defensively. The Court's "rationale" was that the risk of multiple liability and the danger of "massive evidence and complicated theories" would be significantly increased if both indirect and direct purchasers were permitted to be antitrust plaintiffs.

Defendants assume that these same considerations would be present if Dollar were permitted to sue for injuries that were more directly felt by the Dollar licensees. However, this assumption is unwarranted.

First, there is no serious threat that a grant of standing to Dollar would lead to multiple liability. The damage allegedly suffered by Dollar is lost royalites. The damage allegedly suffered by the licensees is lost revenues. Assuming recovery, there is no reason why Dollar and those licensees that have been joined as plaintiffs would not be entitled to recover their separate losses and each have their respective amount trebled. In the markets where Dollar sued, but its "excluded" licensees did not, Dollar would be entitled only to its lost royalties.

Second, although Dollar must establish damage to its licensees before it can prove damages to itself, Dollar's damages can be easily calculated once it demonstrates its licensees' lost revenues. In contrast to *Illinois Brick and Hanover Shoe,* there would be no

need to analyze and trace the effects of the immediate plaintiff's injury on the more remote plaintiff. Rather, Dollar's damages could be computed simply by applying the percentage set by the License Agreement to the licensees' lost revenues.

Finally, although Dollar must prove its damages by reference to its licensees' lost revenues, this method of proof would not unduly complicate the trial. Defendants do not contend that *no one* can sue for the exclusion of Dollar's licensees from the on-airport market. They do not deny that the licensees should be permitted to sue. But if the licensees were permitted to sue they would introduce the same evidence in support of their damage claims that Dollar would produce. The litigation would therefore not be simplified by a ruling that Dollar lacks standing to sue. The "rationale" of *Illinois Brick* is therefore not applicable.

To summarize, the Court has found that Dollar has standing to sue for lost royalties even though some of its licensees were more directly "hit" by defendants' allegedly anticompetitive activities. Defendants' conduct was directed against the on-airport car rental market. Dollar was deeply involved in that market. Moreover, defendants could reasonably have foreseen that Dollar would be affected by their conduct. In keeping with congressional policy to encourage private treble damage actions

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[40] Rule 16 provides:

"In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

"(1) The simplification of the issues;

"(2) The necessity or desirability of amendments to the pleadings;

"(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

"(4) The limitation of the number of expert witnesses;

"(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

"(6) Such other matters as may aid in the disposition of the action.

"The court shall make an order which recites the action taken at the conferenoe, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions."

as a means of antitrust enforcement, the Court must find that Dollar has standing. Nothing in *Illinois Brick* compels a contrary result.

IV. *BURDEN OF PROOF*

Defendants' third and final motion is for a pretrial order with respect to burden of proof. Relying on Rule 16 of Federal Rules of Civil Procedure,[40] which permits the Court to make pretrial rulings in the interest of facilitating preparation for trial, defendants seek an order that would require plaintiff Dollar to prove "fact of damages" at trial on an airport-by-airport basis. Their suggested order provides:

> "As to each airport for which plaintiff claims damages by reason of its exclusion, plaintiff shall be required at trial to present sufficient evidence from which a jury can conclude that there was a causal connection between the allegedly unlawful acts of defendants and plaintiff's claimed exclusion from each airport."

Although the Court has not found a case that deals with this question directly, it concludes in light of general principles of antitrust torts and remedies that defendants' motion should be granted.[41]

The Court wishes to emphasize at the outset that its pretrial order applies only to Dollar's proof of the *fact of damages*. Antitrust plaintiffs have long been required to prove three separate elements before recovering treble damages; that defendants have violated the antitrust laws; that some damage has resulted from this violation; and that the amount of damages is roughly ascertainable. The Court finds that before Dollar can recover damages resulting from its exclusion from any one

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[41] Plaintiff has argued that this order is premature and that the Court can grant a directed verdict at the end of Dollar's case if fact of damages is not adequately proved. The Court agrees that it would not permit a jury award with respect to airports for which no evidence had been presented. However, it does not agree that this obviates the need for the proposed order. One of the purposes of Rule 16 is to permit the Court to "make rulings on questions of law in order to facilitate preparation for trial." 3 Moore's Fed.Prac. 2d §57 16.16, at 1125. The proposed pre-trial order will further this purpose, primarily by offering guidance as to the scope of discovery. *See* Manual for Complex Litigation, § 1.80, at 80-81 (1977).

particular airport, it must prove the second element, fact of damages, with respect to that airport. This is in keeping with the long-established principle that although plaintiff's burden of proving the *amount* of its damages may be relaxed in an antitrust case, its burden of proving the *fact* of its damages is never lightened. *See Story Parchment Co. v. Paterson Parchment Co.*, 282 U.S. 555, 562, 51 S.Ct. 248, 75 L.Ed. 544 (1931); *Flintkote Co. v. Lysfjord, supra,* 246 F.2d at 392.

In proving fact of damages, an antitrust plaintiff must show with reasonable probability the existence of a causal connection between defendants' antitrust violation and its injury.[42] *See Pacific Coast Agr. Export Ass'n, supra,* 526 F.2d at 1205—1206; *Knutson, supra,* 468 F.Supp. at 229 & n.3. Dollar's opposition to defendants' motion is based on its assertion that it can meet this burden by establishing that defendants entered into a national conspiracy, and then by showing a resultant "general pattern of exclusion" from the nation's airports. *See Richfield Oil Corp. v. Karseal Corp.*, 271 F.2d 709 (9 Cir. 1959), *cert. denied,* 361 U.S. 961, 80 S.Ct. 590, 4 L.Ed.2d 543 (1960). The Court disagrees.[43]

In the second *Karseal* case, relied upon by plaintiff, the Court of Appeals for the Ninth Circuit affirmed a jury verdict awarding treble damages to plaintiff Karseal. This verdict was based on a finding that defendant Richfield had conspired to restrain the sale of Karseal's wax at the approximately 3,000 service stations that sold Richfield gasoline. Although the jury was permitted to award damages on the basis of plaintiff's lost sales to *all* of Richfield's stations, the trial court had not required Karseal to prove exclusion of its product from each station separately. Rather Karseal was permitted to introduce representative evidence from which the jury could find "a general pattern of exclusion." 271 F.2d at 712.[44]

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[42] For a more complete discussion of the applicable causation standards and how they affect this case, *see supra,* at 1099-1100.

[43] The Court recognizes that causation is generally a question of fact for the jury. *See e.g., Continental Ore, supra,* 370 U.S. at 700-701, 82 S.Ct. 1404. However, the issue of whether plaintiff's causation evidence is sufficient to get to the jury is a question of law. *See e.g., Sound Ship Bldg. Corp. v. Bethlehem Steel Co.*, 533 F.2d 96, 99 (3 Cir.), *cert. denied,* 429 U.S. 860, 97 S.Ct. 161, 50 L.Ed.2d 137 (1976).

[44] According to the Ninth Circuit Court of Appeals, this evidence was as follows:

A "general pattern of exclusion" from the nation's airports will not be sufficient to show fact of damages in the cases at bar, however, even if plaintiff first establishes a national conspiracy. In *Karseal,* unlike the present situation, plaintiff's burden of proving fact of damages was met in part by a prior decree in a government civil suit. This decree stated that Richfield's exclusive dealing contracts had " 'the necessary and intended effect of denying manufacturers and suppliers of * * * automotive accessories, competitive to those manufactured or sponsored by Richfield, access to a substantial number of outlets.' " *Id.* at 711. Moreover, it indicated that the anticompetitive impact of defendant's conduct reached every service station with which defendant had an exclusive dealing agreement. The only question left for the jury to determine was whether plaintiff's wax was among the products falling within the "automobile accessories" language of the prior decree. *Id.* at 713, 727. There was no need for a redetermination of the geographic impact of Richfield's exclusive dealing contracts.

In the cases at bar, there is no prior decree establishing impact at each airport. To the contrary, defendants have submitted voluminous materials in support of their motions indicating that the factors leading to Dollar's exclusion differed greatly from airport to airport.[45] *See Chestnut Fleet Rentals, Inc. v. Hertz*

"The testimony offered by Karseal consisted of distributors and salesmen for 'Wax Seal,' a former Richfield service station operator, a former merchandiser for Richfield, a former TBA man for Richfield and an independent service station operator and others. Without enumerating the testimony in detail, the record shows that distributors for 'Wax Seal' were generally unsuccessful in their efforts to sell their product to Richfield TBA men and Richfield service stations; that a Richfield representative told the Richfield service station operator to get Wax Seal out of his window or they would both lose their jobs; that salesmen for 'Wax Seal' were told not to come in when Richfield men were around; that 'Wax Seal' was occasionally sold in Richfield service stations but kept under the counter and not displayed. A former merchandiser for Richfield testified that he would warn and threaten Richfield dealers who carried nonauthorized TBA products. A Richfield merchandiser told a Richfield operator he did not want to see 'Wax Seal' in the station." 271 F.2d at 712.

[45] It was in anticipation of such a situation that the Court, in its first pretrial order, required the parties to support their *Noerr-Pennington* and causation argument with specific facts obtained through discovery at the "test" airports.

Corp., 72 F.R.D. 541, 548 (E.D.Pa.1976). Unlike *Karseal*, where the prior decree established the geographic scope of defendant's antitrust violation and plaintiff was permitted to use "pattern evidence" merely to show that its product was among the products found to be affected by this violation, there is no showing here that defendants' conduct had an impact at each airport from which plaintiff claims it was excluded. *Karseal* is therefore not controlling.[46]

As the Court's analysis in earlier parts of this opinion has demonstrated, many factors could have caused Dollar's exclusion from the on-airport car rental markets. Some of these factors—such as a failure by Dollar to seek entry or an exercise of independent judgment by an airport official—were outside of defendants' control. Unlike *Karseal*, where defendant Richfield entered into identical exclusive dealing contracts with each of its service stations and therefore exercised contractual control over whether plaintiff's product could enter the market, defendants here lacked such universal dominant control. Their influence had to be asserted upon a different airport official at each airport. Thus, even if Dollar were able to prove that defendants had embarked on a nationwide conspiracy to eliminate plaintiff as a competitor, and that the conspiracy had successfully been executed at a handful of selected airports, the Court would still not permit the jury to infer that the conspiracy was successful at

[46] This conclusion is supported by the "motion picture" cases cited by defendants. In *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260 (1948), the Supreme Court upheld a finding that Paramount and others had entered into a nationwide conspiracy to restrict the distribution and exhibition of motion pictures. Following this decision, numerous private theatre owners filed antitrust damage suits against the *Paramount* defendants based on the conspiracy established in the government's case. *See e.g., Theatre Enterprises, Inc., v. Paramount Film Distributing Corp.*, 346 U.S. 537, 74 S.Ct. 257, 98 L.Ed. 273 (1954); *Sun Theatre Corp. v. RKO Radio Pictures, Inc.*, 213 F.2d 284 (7 Cir. 1954); *Twentieth Century-Fox Film Corp.. v. Brookside Theatre Corp.*, 194 F.2d 846 (8 Cir. 1952), cert. denied, 343 U.S. 942, 72 S.Ct. 1035, 96 L.Ed. 1348 (1952); *Sablosky v. Paramount Film Distributing Corp.*, 137 F.Supp. 929 (E.D.Pa.1955). In all these cases, plaintiffs were required to support their claim with evidence that their particular theatres had been affected by defendants' conduct. The courts required this proof because there had been no determination in *Paramount* as to which theaters were affected by defendants' conspiracy and because the governmental decree had only a *prima facie* effect.

the airports for which no evidence was introduced. Too many independent factors could have been the cause of the exclusion. *Cf. Zenith, supra,* 395 U.S. at 114, 89 S.Ct. 1562. Dollar should not be permitted to recover damages for its exclusion from airports without some showing that it sought entry, or that it would have been futile to seek entry, and without a showing that defendants had approached the airport authorities with the goal of excluding plaintiffs.

The Court does not mean to suggest that plaintiff must produce evidence negating every possible cause of its exclusion other than defendants' conduct. *See Zenith, supra,* 395 U.S. at 114 n.9, 89 S.Ct. 1562; *Knutson v. Daily Review, Inc.,* 548 F.2d 795, 811 (9 Cir. 1976), *cert. denied,* 433 U.S. 910, 97 S.Ct. 2977, 53 L.Ed.2d 1094 (1977), *on remand,* 468 F.Supp. 226 (N.D.Cal. 1979). It is merely stating that with respect to each airport for which damages are claimed, Dollar must produce evidence sufficient for the jury to infer that defendants' conduct was a cause of its exclusion. *See Continental Ore Co., supra,* 370 U.S. at 697, 82 S.Ct. 1404. The jury will not be permitted to award damages for plaintiff's exclusion from any airport for which such evidence has not been presented.

Accordingly, IT IS HEREBY ORDERED that defendants' summary judgment motion with respect to the airports at Austin, Texas; Denver, Colorado; and Miami, Florida, on the grounds of *Noerr-Pennington* and causation is denied.

IT IS HEREBY FURTHER ORDERED that defendants' summary judgment motion directed against plaintiff Dollar on grounds of standing is denied.

IT IS HEREBY FURTHER ORDERED that defendants' motion for a pretrial order with respect to burden of proof is granted.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: Airport Car Rental Antitrust Litigation	
BUDGET RENT-A-CAR OF WASHINGTON-OREGON, INC.,	**No. 81-4399** **DC No. 78-0697**
Plaintiff-Appellant,	**JUDGMENT**
v.	
THE HERTZ CORP. and NATIONAL CAR RENTAL SYSTEM, INC.,	
Defendants-Appellees.	

APPEAL from the United States District Court for the NORTHERN District of CALIFORNIA.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the NORTHERN District of CALIFORNIA and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered November 16, 1982.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: Airport Car Rental Antitrust Litigation	)	
	)	
BUDGET RENT-A-CAR OF WASHINGTON-OREGON, INC.,	)	**No. 81-4399**
	)	**DC No. 78-0697**
Plaintiff-Appellant,	)	
	)	**ORDER**
v.	)	
THE HERTZ CORP. and NATIONAL CAR RENTAL SYSTEM, INC.,	)	
Defendants-Appellees.	)	

Before: CHOY, SNEED and FARRIS, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has voted to grant rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Filed and entered January 26, 1983.

APPENDIX F

Sherman Antitrust Act, Section 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. 26 Stat. 209, as amended, 15 U.S.C. §1 (1976).

Sherman Antitrust Act, Section 2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. 26 Stat. 209, as amended, 15 U.S.C. §2 (1976).

Clayton Act, Section 4

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. 38 Stat. 731, 15 U.S.C. §15 (1914).

Clayton Act, Section 16

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction ovoer the parties, against threatened loss or damage by a violation of the antitrust laws, including

sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of subtitle IV of Title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff. 38 Stat. 731, as amended, 15 U.S.C. §26 (1976).

First Amendment, United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. Amed. I.

Revised Code of Washington, Title 14, Aeronautics
Chapter 14.07, Section 010.

General powers—Municipal purpose and public use. Any city, town, port district or county is hereby authorized an empowered by and through their appropriate corporate authorities to acquire, maintain and operate, within or without the boundaries of the counties in which such city, town or port district is situated, sites and other facilities for landing, terminals, housing, repair and care of dirigibles, airplanes, and seaplanes, and seaplanes for the aerial transportation of persons, property and mail or for use of military and naval aircraft, either jointly with another city, town, port district, county, the state of Washington, or the United States of America or severally, and the same is hereby declared to be a municipal purpose and a public use. [1841 c 21 § 1; Rem. Supp. 1941 § 2722-8. Prior: 1933 ex.s. c 3 § 1; 1929 c 93 §

1; 1919 c 48 § 1.]

Revised Code of Washington, Title 53, Port Districts
Chapter 53.04, Section 010.

Port districts authorized—Purposes. Port districts are hereby authorized to be established in the various counties of the state for the purposes of acquisition, construction, maintenance, operation, development and regulation within the district of harbor improvements, rail or motor vehicle transfer and terminal facilities, water transfer and terminal facilities, air transfer and terminal facilities, or any combination of such transfer and terminal facilities, and other commercial transportation, transfer, handling, storage and terminal facilities, and industrial improvements. [1963 c 147 § 1; 1911 c 92 § 1; RRS § 9688.]

Oregon Revised Statutes, Chapter 778, Port of Portland
Section 010.

Port of Portland created; boundaries; capacity to sue. The Portland metropolitan area hereby is created as a separate district, to be known as the Port of Portland. The inhabitants thereof hereby are constituted and declared to be a corporation by the name and style of "The Port of Portland," and as such shall have perpetual succession, and by that name shall exercise and carry out all the powers and objects conferred on it by law. The port may sue and be sued, plead and be impleaded in all actions, suits or proceedings brought by or against it; provided, however, that the bonded or other indebtedness of the port which was chargeable to or a lien upon the property within the limits of the port:

(1) Prior to June 30, 1963, shall not be chargeable to or a lien upon all of that property which lies east of the east boundary line of range two east of the Willamette Meridian in Multnomah County; or

(2) Prior to June 30, 1973, shall not be chargeable to or a lien upon all that property lying within the boundaries of Clackamas and Washington Counties.

[Amended by 1963 c.124 § 1; 1973 c. 178 § 2]

Oregon Revised Statutes, Chapter 778, Port of Portland
Section 015.

Purposes and general powers of the port. The object, purpose and occupation of the port shall be to promote the maritime, shipping, aviation, commercial and industrial interests of the port as by law specifically authorized. The port may acquire, hold, use, dispose of and convey real and personal property, make any and all contracts the making of which is not by this chapter expressly prohibited. It may do any other acts and things which are requisite, necessary or convenient in accomplishing the purpose described or in carrying out the powers granted to it by law. The port may supply surface and air craft with fuel and other supplies at reasonable cost as may be for the best interests of the port.

[Amended by 1959 c.362 § 1; 1971 c.726 § 104]